Supreme Court of the United States.

SAMUEL H. STONE, AUDITOR, &c ..... *Appellants*,

vs. No. 356.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF KENTUCKY ..... *Appellees*,

SAMUEL H. STONE, AUDITOR, &c. ..... *Appellants*,

vs. No. 385.

THE FARMERS BANK OF KENTUCKY ..... *Appellee*.

FARMERS BANK OF KENTUCKY ..... *Appellant*,

vs. No. 386.

SAMUEL H. STONE, AUDITOR, &c ..... *Appellees*.

SAMUEL H. STONE, AUDITOR, &c ..... *Appellants*,

vs. No. 387.

THE DEPOSIT BANK OF FRANKFORT ..... *Appellee*.

BRIEF FOR STONE, AUDITOR, &c.

Statement of Case.

On the 17th day of May, 1886, the Legislature passed "An act to amend the revenue laws of the Commonwealth of Kentucky," known as the Hewitt law (article 2, chapter 92, General Statutes of Kentucky), under which the various banks of the State that had accepted the provisions thereof claimed they had an irrevocable contract of exemption from all local

taxation. This claim was never recognized by the State and local authorities, because the Hewitt law was, by its express terms, repealable at pleasure of the Legislature.

In 1891 the new Constitution of Kentucky provided that—

> "All property whether owned by natural persons or corporations shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property." (Section 174.)

In 1892 the new revenue law of the State required the banks and other corporations to pay local taxes as provided by section 174 of the State Constitution.

The banks claimed said provisions of the State Constitution and act of 1892 were null and void as to them, because repugnant to the contract clause of the Federal Constitution; and having instituted suits in the State court for injunctions against collection of local taxes from them, the Court of Appeals of Kentucky, through Judge Pryor, in 1895, decided the banks had irrevocable contracts of exemption under the Hewitt law; and, under the mandate in said suits, a broad order of injunction was entered in the Franklin Circuit Court on 21st of January, 1896, restraining the county and city from collecting, or attempting to collect, any local taxes from these banks (see copy of said order on page 10 of record in Bank of Kentucky Case), from which order appeals were prayed, which are now pending in Kentucky Court of Appeals.

But in March, 1897, the Kentucky Court of Appeals (through Judge Paynter) on appeals by the banks against the city of Owensboro, decided that the Hewitt law was repealable and the contracts of the banks thereunder had been abrogated by the Kentucky Constitution and act of 1892, and overruled the opinion of Judge Pryor on that subject.

Then on 17th day of April, 1897 (notwithstanding the former sweeping order of injunction in State Court), the present suits

for a second injunction were instituted by the banks in the United States Circuit Court, claiming contracts under their charters and under the Hewitt Bill, and also averring that it had been finally adjudicated they had an irrevocable contract of exemption; but the petitions, as will be observed, do not plead the former judgment as an estoppel. The circuit judge (Taft) decided the banks did not have an irrevocable contract under the Hewitt law, but granted the second injunction on the ground that the former judgment was an estoppel as to parties and privies; and from that judgment this appeal is prosecuted.

Specification of Errors.

Sam'l H. Stone, Auditor, &c., defendants below, say that the decree entered herein, by the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, on the 25th day of June, 1898, is erroneous for the following reasons:

1st. Because the court erred in overruling the demurrers of each of said defendants to the plaintiff's petition herein.

2d. Because the court erred in overruling the several pleas to the jurisdiction herein.

3d. Because the court erred in refusing to permit defendant board of councilmen of the city of Frankfort to file the amended answer offered to be filed herein on the 25th day of June, 1898.

4th. Because the court erred in adjudging that by reason of the several pleas of res judicata relied on by complainants, the complainants have established an irrevocable contract with the Commonwealth of Kentucky, under the provisions of the Act of May 17, 1886, known as the Hewitt Bill.

5th. Because the court erred in enjoining and restraining Sam'l H. Stone, Auditor, Charles Finley and Geo. W. Long from proceeding to value the franchises of complainants, under the Act of November 11th, 1892, for the years 1895, 1896, 1897

and 1898, and for all subsequent years until expiration of complainants charters, and also erred in enjoining and restraining the several counties and cities, defendants herein, from endeavoring to collect any tax upon any valuation, from complainants, and also erred in adjudging that complainants, by making payment of taxes to the State in accordance with said Hewitt law, is discharged in full from all taxes, and also erred in adjudging that the provisions of the present Constitution of Kentucky and the Act of November 11th, 1892, in so far as they are intended to provide, or do provide, for any assessment or taxation of complainants' property, rights of property, or franchises, except under said Hewitt Bill, are repugnant to the Federal Constitution, and void.

Brief of Argument.

The banks contend that Article two (2) of the Hewitt Bill constituted an irrevocable contract between them and the State. That proposition, the Auditor and "Board of Valuation and Assessment," together with the counties and cities, deny. Upon the determination of the question thus presented the merits of these cases depends.

In 1886, when the Hewitt Bill was adopted, the banks' charters were repealable at the legislative will, by virtue of the general Act of February the 14th, 1856, which expressly reserved to the Legislature the power to repeal all charters and grants thereafter adopted. The partial immunity from taxation granted the banks by the Hewitt Bill was, therefore, a mere gratuity, and subject to revocation at any time by the Legislature, independently of any express reservation of the repealing power. The right of repeal, however, was expressly reserved, both by the said Act of 1856 and also by section six (6) Article two (2) of the Hewitt Bill itself. It would seem, therefore, that there is no reasonable ground whatever on which to question the power of the constitutional convention

of 1891 to abrogate the said Hewitt law and subject all banks of the State to an equal and uniform system of taxation.

The circuit court of the United States for the District of Kentucky, in these cases, and also the Kentucky Court of Appeals, in the Owensboro cases now pending in this court, decided said question (as to irrevocable contract rights) adversely to the banks. The judgments of those two courts on that subject are so well fortified by the opinions filed in support thereof, one written by Judge Taft and the other by Judge Paynter, that further argument on our part, as to that question, would be superfluous. See opinion by Judge Taft herein as to the Northern Bank of Kentucky, and said opinion by Judge Paynter—Appendix to this brief.

The banks, however, claim that, by reason of certain judgments (set forth in their bills), the Auditor, &c., and the court are estopped from all inquiry into the said original question of contract.

But the claim of estoppel is not available in these cases, because:

1st. The judgments against the city of Frankfort, relied upon by the banks, were duly appealed from by said city, and same are now pending, subject to reversal or modification, in the Kentucky Court of Appeals.

2d. Neither the Auditor nor the Board of Valuation and Assessment, nor any member thereof, was a party or privy to the former suits.

3d. The adjudication relied on was as to a matter of law (not of fact), and is not conclusive in these cases.

4th. The question of contract decided in the former suits was not the same as the question of contract presented in these cases; nor did the question arise under the same circumstances in the former as in these cases.

5th. The banks, in their bills of complaint, have opened said judgments and the original question of contract, and

thereby waived and defeated the erroneous presumption upon which they rely.

6th. The chancellor will not interpose to aid in giving effect to an erroneous and unjust adjudication.

There are other reasons against said estoppel—as the absence of jurisdiction, comity between the State and Federal Courts, and the pendency of suits in the Franklin Circuit Court between the parties hereto involving the same questions presented in these cases—which will be considered in general suggestions at the close of this brief.

I.

Appeals Pending in Kentucky Court of Appeals.

> "When an appeal is taken from a judgment, it is evident the appellant can not have the full benefit of his appeal if during the time necessary to procure a decision in the appellate court the judgment may be used against him to the same extent as if no appeal had been taken. * * * In perhaps a majority of the States the perfecting of an appeal suspends the operation of a judgment as an estoppel, and renders it no longer admissible as evidence in any controversy between the parties."
>
> Freeman on Judgments, 4th Edition, Vol. 1, § 328, and authorities there cited.

And that is the effect of appeal in Kentucky.

Yocum v. Moore, 4 Bibb., 221.

Talbott v. Morton, 5 Littell, 326.

Cox v. Griffith, 12 Ky. Law Rep., 842.

Civil Code of Practice, Ky., § 747 (last edition).

Appeal without supersedeas does not generally prevent execution of the judgment, and the lis pendens is a bar to a second suit upon the same cause of action. But an issue that is "sub judice" in a "lis pendens" is not "res judicata" for the purpose of estoppel in another case, on a different cause of action.

We deem it unnecessary to cite further authority in support of the foregoing proposition.

In the Deposit Bank case, the said appeal now pending in Kentucky Court of Appeals, is the first appeal to that court in that case.

The allegation that the decision in that case was, by agreement, to be controlled by the decision in other cases is unfounded in fact, and is expressly controverted by the answer to the bill of that bank herein.

The judgment in said Deposit Bank case is not only erroneous, but void, same being a judgment for injunction in a suit by the city for taxes, in which suit no ground whatever for injunction is set forth or relied upon. The entry of same was a clerical misprision, and permitted by oversight on part of the court. All the foregoing in regard to the Deposit Bank judgment is apparent from the record in the case of that bank.

Said appeals in the Bank of Kentucky and Farmers Bank cases are second appeals in the same cases, for error generally, and especially because the judgments below (in Franklin Circuit Court) do not conform to the mandates of the Court of Appeals.

Said appeals, therefore, involve, not only the original question of contract, but also the question as to the force and effect of the judgments below (in Franklin Circuit Court) now relied on by the banks herein.

That said appeals were duly prosecuted and are now pending may be seen by reference to § 734 of the Civil Code of Practice of Kentucky and the printed records herein.

Deposit Bank, pages 116 to 120.

Bank of Kentucky, pages 144 to 147.

Farmers Bank, pages 235 to 239.

The question of what effect should be given the judgments relied on by the banks as a technical estoppel herein is the principal question involved in each of said pending appeals. That is a question peculiarly appropriate to the jurisdiction of

the Kentucky Court of Appeals, as that court should be allowed to determine the meaning and effect of its own mandate.

As recently declared by this court in Phœnix Insurance Co. v. Tennessee, 161 U. S., pages 183 to 186—

> "There is no contract in the case. It is wholly one of evidence as to whether or not a prior judgment in a State court should operate as an estoppel."

Said judgments can not have, in this or any other court, any greater or other effect than that which is given them by the said Court of Appeals.

Revised Statutes, U. S., § 905.

Hence, whatever effect that court may give the said judgments on the trial of the said pending appeals, will determine their effect in all other courts, and will be sustained by this court on writ of error to that court.

It is manifest, therefore, that said judgments should not, in these cases, be awarded any conclusive effect during the pendency of said appeals. The banks will have a plain remedy by writ of error from this court, should their alleged contract rights be impaired by the opinion of the Kentucky Court of Appeals as to the proper effect of said judgments.

II.

Parties and Privies.

The records show that neither the Auditor nor the "Board of Valuation and Assessment," nor any member thereof, was a party to either of the former suits.

Were they or either of them privy to the former suits?

> "In the law of estoppel one person becomes privy of another (1) by succeeding to the position of that other as regards the subject of the estoppel; (2) by holding in subordination to that other."
>
> Bigelow on Estoppel, 5th Edition, page 142, and authorities there cited.

In what sense the Auditor and said board may succeed to the position of any county or city as regards the subject of estoppel herein, or hold in subordination to any county or city, is difficult to understand.

It is suggested that the counties and cities are the real parties in interest, and that the Auditor and said Board are nothing but their agents in the matter of assessment, etc., of franchises.

That view ignores the interest of the State and State officers, and assumes a relationship of principal and agent which does not exist.

The State of Kentucky is one of the real parties in interest herein. Article two (2) of the Hewitt Bill, if irrepealable, is a limitation upon the taxing power of the State, not only as to local but also as to State taxation. It prescribes not only the rate of taxation for State purposes, but also the mode of taxation both for State and local purposes. It ties the hands of the State in the matter of taxation and compels the State to conform its revenue system to said Article two (2) of the Hewitt Bill. Confusion, inequality and want of uniformity in the most important branch of the State government is the result.

The State is certainly interested in a litigation which may contract the boundary of the exercise of its sovereignty and nullify important porvisions of its organic and statutory laws, independently of the interest of any county or city.

The State has the right to dictate its own internal policy, and to protect each taxpayer from inequalities in the matter of taxation. That right the proposed estoppel would take from the State without allowing it a day in court.

Besides, the State is directly interested in local taxation generally, and in the taxation imposed by each county and city. Certain important functions of the State government are performed through local officers—as the collection of State revenues, service of process, keeping and preservation of public records. Hence local taxation is, to a large extent, only an indirect mode of taxation for State purposes.

The proposition, that the State is estopped by a litigation to which it was not a party, and to which no person authorized to act for the State was a party, and when the State does not succeed to the position of nor hold in subordination to any person who was a party, needs no refutation. Indeed the State can not have been party or privy to the former suits, because the State can not be sued without its consent. The State, therefore, is not estopped by said judgments.

The State not being estopped, are the officers of the State, acting only for and on behalf of the State, estopped? The State can not act except through her representatives. Every act of an authorized representative of the State is an act of the State. And wherever an authorized representative of the State, in discharge of a duty prescribed by the State, is estopped, the State is thereby estopped.

Persons authorized to act as State officers are subject to estoppel, and to injunction, and to mandamus, independently of the State's liability thereto.

But that is upon the hypothesis that said persons threaten to transcend their official authority. The State officers made parties to these suits do not threaten to transcend their official authority. The Auditor and "Board of Valuation and Assessment," in making the assessment of franchises and certifying same to the county clerk, act only as prescribed and directed by the State Constitution of 1891 and the revenue Act of 1892, and in doing so they are the direct representatives of the State. The proposed estoppel, therefore, against the Auditor and said Board would be in effect and in fact an estoppel against the State, in the matter of the assessment, &c., of franchises.

Having shown that the State is not estopped by said judgments, it follows necessarily that the Auditor and "Board of Valuation and Assessment" are not estopped thereby. Said Auditor and Board constitute the only medium through which the assessment and certification in controversy can be made. Then of what value, effect or consequence, would the State's

exemption from estoppel by said judgments be, if the Auditor and Board of Valuation and Assessment be estopped by said judgments from making the assessment, etc.?

In Re Ayer, 123 U. S., 443, and authorities therein cited.

See also opinion of Judge Taft herein as to Northern Bank of Kentucky, found in printed record of Deposit Bank of Frankfort case, on pages 99 to 102, which shows that the State was not privy to the former suits, and is not estopped by said judgments.

Of course said judgments do not affect the State's interest in this litigation, nor its authority in the matter of said assessment and certification.

Said erroneous judgments, rendered in 1896, do not invalidate the State Constitution of 1891 nor the revenue Act of 1892, the State not having been party or privy to the former suits, and the legislation complained of having been enacted prior to the erroneous judgments relied upon by the banks.

The official authority of said State officers is, of course, coextensive with the authority of the State, in respect to the assessment and certification in controversy.

The question, therefore, of whether or not said State officers would be acting ultra vires in making the assessment and certification in controversy must be considered and determined independently of said erroneous judgments.

As to the suggested relationship of principal and agent between the counties and cities and the Auditor and Board of Valuation and Assessment, Mechem on Agency (1889 Ed.), page 1, declares:

> "Agency is a legal relation, founded upon the express or implied contract of the parties, or created by law, by virtue of which one party, the agent, is employed to represent and act for the other, the principal, in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority."

In what respect does the Auditor and the Board of Valuation and Assessment represent any county or city? and how is any part of the Auditor's or said Board's authority derived from any county or city? Whom do the Auditor and said Board represent in making the assessment and certification of franchises? and from what source do they derive their authority? The Auditor and said Board, in making the assessment, etc., as provided in the revenue act of 1892, represent the State, and they derive their authority to act in that matter directly and entirely from the State. There is no contract, express or implied, between any county or city and the Auditor or said Board of Valuation and Assessment. Hence there is no such relation as that of principal and agent between them.

The agency which renders a judgment against the principal an estoppel against the agent, or vice versa, must be a well defined agency. The character and scope of the agent's authority must appear, within which scope the agent may act for the principal and the principal may control the action of the agent.

But why should we discuss the relation between a municipality and the Auditor and said Board, when it must be conceded that said judgments do not estop the State; from which it follows necessarily that the Auditor and Board of Valuation and Assessment, representing the State in making the assessment, etc., are not estopped by the said judgments.

We would suggest also that the State officers made parties hereto have an interest in this litigation, apart from that of the State or any municipality. Each of them having been elected by the people of the entire State, having assumed the responsibilities of office, and having executed bond for the faithful performance of their official services as prescribed by the Constitution and laws of Kentucky, they are not only officially, but also personally, interested in the subject of this litigation. Is an officer not materially interested in the responsibilities and duties of his office? Do not the bills of complaint herein charge them with a violation of law and such

unauthorized action as would render each of them personally responsible in damages to the banks? And are they estopped from denying the charge of misfeasance in office, and from asserting their official responsibilities and duties, by a former litigation to which neither of them was a party and in which their interest was not represented? (Saying nothing of several thousand dollars' costs, for which Sam'l H. Stone, Chas. Finley and Geo. W. Long will be individually liable, if the injunction prayed for herein be granted.)

If the exercise of the State's sovereignty may be limited and prescribed, and the duties and responsibilities of State officers determined by a litigation to which neither the State nor any officer of the State is a party, because an interested county or city of the State is a party thereto, the Commonwealth and all State officials should not be indifferent to any litigation to which a county or city of the State may be a party.

The State of Kentucky and the Auditor and Board of Valuation and Assessment, through their authorized representative, the Attorney General, are now in this court protesting against such estoppel, asking a trial of these causes upon their merits, and declaring that this is the first day they have ever had in court to try their rights now in controversy.

The fact that the bills of complaint do not name the State nor the Auditor nor the Board of Valuation and Assessment as a party defendant herein, does not affect the real character of the cases. It is perfectly obvious upon the face of said bills that the object of the suits is to enjoin Sam'l H. Stone, Chas. Finley and Geo. W. Long, and through them enjoin the Auditor and Board of Valuation and Assessment, and through them enjoin the State of Kentucky from giving effect to the State Constitution of 1891 and revenue Act of 1892 in so far as the same require the assessment, etc., of complainants' franchises for the purposes of taxation.

In Re Ayer, 123 U. S., 443, and the authorities therein cited.

Neither the State of Kentucky, therefore, nor the Auditor

nor the Board of Valuation and Assessment, nor either Sam'l H. Stone, Chas. Finley or Geo. W. Long is estopped herein by the said judgments, neither of them having been a party or privy to the former suits.

The State not being estopped, no municipality is estopped; because there is such a community of interest between the State and each municipality, with respect to the subject of estoppel, that neither can be estopped without affecting the interest of the other. Indeed the right of the State extends, not only to assessment of the franchises and certification of same to the county clerk, but also to collection of the taxes thereon. If collection of the taxes be inhibited, the assessment and certification would be futile.

The authorities on the subject of "Privity" are well collated and commented upon in the "American and English Encyclopedia of Law," vol. 21, pages 184 to 234. But the case of In Re Ayer, 123 U. S., 443, which is a clear, exhaustive and correct exposition of the law on this subject, and which has been repeatedly approved by this court, with the authorities therein cited, will be found conclusive as to the proposition of estoppel herein.

The fact that these are really suits against the State, in violation of the 11th Amendment to the Constitution of the United States, will be further considered in this brief, in what we shall suggest on the subject of jurisdiction.

III.

Adjudication as to Matter of Law.

> "It must not be supposed that the parties would be estopped by a judgment in one cause of action from disputing in another cause of action the doctrines of law applied in the first. * * * What is law for one must be law for all; and there could be no advantage in extending the doctrine of res judicata to such cases."
> Bigelow on Estoppel, 5th Edition, pages 100 to 101, and authorities there cited.

Mr. Justice Bradley, in the case of South Ottawa v. Perkins, 94 U. S., page 267, expressed the view of this court on that subject as follows:

> "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be the law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place and not a law in another in the same State."
>
> "And whether it be a law or not a law is a judicial question, to be settled and determined by the courts and judges.
>
> "The doctrine of estoppel is totally inadmissible in the case."

The banks herein propose that, by reason of estoppel against the truth, and in contradiction of the truth, in a court of equity, the law as to about a dozen banks of Kentucky is not the law as to the remainder of the 254 banks of Kentucky; that the law as to the Deposit Bank of Frankfort, is not the law as to the State National Bank of Frankfort; that the law as to the Bank of Kentucky is not the law as to the Farmers Bank of Kentucky; that the law as to the Farmers Bank of Kentucky at Frankfort is not the law as to the same bank at Georgetown, nor in Scott county, etc.

In the case of Richardson v. The City of Boston, 19 Howard, U. S., page 268, this court (as to the principal issue in the case) said: "A party is not concluded by an erroneous opinion of the court pronounced in a former case" (between same parties).

The court of Appeals of New York, in Goodale v. Tuttle, 29 N. Y. Reports (2 Tiffany,) 467, declared: "A recovery upon no title alleged, which recovery was based wholly upon a mis-

understanding of the law, though it would be binding in the particular case, would not estop any right which could be availed of in a subsequent litigation."

To the same effect is Bernard v. City of Hoboken, 3 Dutcher's (2 7 N. J. Law) Reports, 412.

In the case of Packet Co. v. Sickles, 5 Wallace, 585, Messrs. Carlisle & Davidge, for the plaintiff in error, in stating their side of the case, said:

> "We are estopped only from denying the particular points of facts found, to-wit, a parole promise. The fact, if true, that we did not at the former trial make objection on this ground was, at most, but an admission for the purposes of that case. It was an admission of law, which does not estop in any subsequent case."

This last proposition was not controverted by the other side, and appears to have been concurred in by this court in that case.

The recognized accuracy and ability of said counsel, entitle their deliberate statement as to a proposition of law to some consideration. Especially when the same seems to have been approved by the opposite party and the court in the said case. In support of the said proposition said counsel referred to the case of Richardson v. City of Boston, 19 Howard, 268, in which this court expressly so held.

In the case of Sawyer v. Woodbury, 7 Gray (Mass.), 502, the court, in speaking of this character of estoppel, said:

> "This estoppel is attended with conditions and qualifications which must be strictly observed, without which it would sometimes operate harshly by excluding the truth. It must be an averment of a fact precisely stated on one side and traversed on the other, and found by the jury affimatively or negatively, and not by way of inference."

In Last Chance Min. Co. v. Tyler Min. Co., 157 U. S., 691, this court said:

> "The essence of estoppel by judgment is that there has

> been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means it was reached."

The foregoing and other authorities establish beyond reasonable controversy that an adjudication as to a matter of law in one case between the parties thereto is not conclusive in any subsequent litigation between the same parties concerning a cause of action different from that formerly adjudicated.

'Tis only findings as to distinct issues of fact in the trial of one cause of action that are, under any circumstances, available as estoppel in the trial of another cause of action.

The causes of action now under consideration are different from those in which said judgments were rendered, both as to the taxes demanded and the alleged breach of contract.

The banks must concede that the suits now being tried are different causes of action from the said former suits; otherwise, the present suits by the banks would be barred by the former suits.

Hence the erroneous decision by the State court as to a question of law, in said former cases, does not estop this court from deciding the same question according to law and the rights of the parties in these cases. (The difference between the question of contract tried in the former cases, and the question of contract presented in these cases, will be hereafter considered.)

The matter now proposed herein as having been adjudicated in said former cases is a matter of law (not of fact).

There was no issue nor finding of fact in said former cases. Article two (2) of the Hewitt Bill was cited and conceded. The acceptance thereof by the banks was alleged and conceded, and the only issue (as to Hewitt Bill contract) presented by the pleadings, and the only matter determined by the court, was as to the proper construction of said Article two (2) of the Hewitt Bill.

Whether or not there was an irrevocable contract between

the banks and the State, and whether or not the State had impaired the obligation of a contract, depended, in those cases, entirely upon the construction of that article.

Whether or not the banks declared, in those cases, that said article and their acceptance thereof constituted an irrevocable contract, is immaterial. Such declaration, if made, was only a conclusion of law. It having been conceded by the pleadings that the banks had accepted the Hewitt Bill, and that the same (accepted) constituted a contract between the banks and the State, the issue arose only as to the construction of the contract—as to the terms and conditions, the meaning and import of the contract—whether the same was, by its terms and meaning, revocable or irrevocable?

That was a question which could only be determined by examination and construction of said article. The issue of law having been thus definitely presented, the State court, in said former cases, adjudged: not that there was a contract (there was no issue as to that), but that, according to the proper construction of said article two (2) the same was irrevocable; and, consequently, that the State Constitution of 1891 and the revenue law of 1892 impaired the obligation of a contract between the banks and the State, and were, to the extent of said impairment, in conflict with the Federal Constitution, and void.

It is this erroneous construction, by the State court, of said article two (2), which is now proposed as res judicata and conclusive of the proper construction of said article in these cases.

The Hewitt Bill was a general statute of Kentucky; and any question as to the proper construction thereof is a question of law. Hence said erroneous adjudication of the State court as to the meaning, import and effect of said general statute (article two (2) of the Hewitt Bill) is not conclusive in these cases.

No better exposition of this subject can be found anywhere

than in Bigelow on Estoppel, 5th Edition, in the chapter on "Judgments in Personam," beginning on page 80 of said edition.

Section 2 of said chapter, after reviewing Duchess of Kingston's case, Cromwell v. Sac, and the other leading cases which extended the doctrine of estoppel by judgment to its utmost limit, concludes (on page 103), as follows:

> "We have now ascertained the nature of the pleas of former judgment and of former verdict, and the distinction between them, the former operating as a bar to subsequent actions founded on the same demand; the latter operating as a bar to the further litigation of the special findings of the jury irrespective of the nature of the cause of action."

'Tis, therefore, only as a "former verdict" that said judgments could be made available in these cases. Estoppel by "former judgment" bars the relitigation of the same cause of action, and applies both to matters of law and matters of fact.

Estoppel by "former verdict" is not confined to the same cause of action. It extends to other causes of action; but is only available to prevent the relitigation of distinct questions of fact formerly determined between the same parties.

It will be found on examination that, in each of the leading cases on which the doctrine of estoppel by "Former Verdict" is founded, the adjudication turned upon some issue or issues of fact. Hence the doctrine, founded upon those decisions extends only to matters of fact. Any dicta in any case to the contrary does not affect the principle nor the law thus established. A title, or legal right, often depends upon the determination of a point of fact. Where that is the case the ascertainment of the fact determines also the title or legal right. This does not conflict in the least with the doctrine of "Former Verdict," above stated.

Various deductions, in a given case, may follow the determination of a single point of fact—as that the plaintiff should

recover, or that the defendant is exempt from taxation—but it is not such deductions, but only the point of fact determined, that may be relied on as an estoppel in another cause of action.

Had the determination of said former cases turned upon a question of acceptance of the Hewitt Bill by the banks, or other like question of fact, the determination of such question might, upon the principle announced in Cromwell v. Sac, be conclusive in these cases. But (as before stated) the said former cases did not turn upon any question of fact, nor upon any mixed question of law and fact, but turned entirely upon a question of law as to the proper construction of a general statute.

If the doctrine of estoppel by "Former Verdict" embraces the construction of a general revenue law, it also embraces the construction of every other character of laws—as statutes of limitation, statutes of frauds, statutes against usury, etc. Indeed, if that be true, it embraces the construction of the organic law of a State and of the United States. The organic and statutory laws, adopted by the people and expounded by the courts, would not constitute the law. The law, in its common acceptation, would not be the law. Certain statutes, as revenue laws, which the organic law declares must be equal and uniform, would not be equal nor uniform. Yet that is the proposition advanced by the banks herein. They contend that the constitutional principle that "taxation must be equal and uniform" does not apply to them—that the same applies to some banks of Kentucky, but not to these banks, or if to these, only in some cases and at some places.

In view of the banks' contention in these cases, we can understand why the courts of this country hesitated before taking the first step in the direction of estoppel by "Former Verdict."

Aspden v. Nixon, 4 Howard, 467.

Packet Co. v. Sickles, 24 Howard, 340.

The courts, while they recognized the convenience and the justice of the doctrine when properly applied, also saw and

apprehended the danger of its abuse. The language of Justice Keating, applied by this court in Cromwell v. Sac, is certainly applicable to these cases, namely: "This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant."

As declared by Mr. Bigelow, in his work on Estoppel, 5th Edition, page 101, "There could be no advantage in extending the doctrine of res judicata to such cases."

That the courts, both of this country and England, concur with Mr. Bigelow in the foregoing, is apparent from the fact that the said doctrine has never been held to embrace a construction of a general law, in any reported case. At least we have not found nor been cited to any such case.

Even the cases in which the doctrine has been extended to the construction of private contracts are few and arose under exceptional circumstances, and each of such cases will be found on examination to be sui generis and confined, as authority, within very narrow limits. The case of Tioga Railroad v. Blossburg Railroad, 20 Wallace, is a case of that character. The case turned upon the meaning of a short clause in a lease, which depended upon external facts and circumstances, which were referred to and determined by a referee. The judgment of the court was founded entirely upon the report of the referee as to said clause of the lease.

The case of Southern Minnesota Co. v. St. Paul Co., 55 Fed. Rep., is not a case to the purpose of the banks herein. That was a second suit upon substantially the same cause of action.

Besides, the former suit turned upon two distinct issues of fact, which were submitted to and determined by a referee, and, as in the said Tioga case, the judgment of the court was based entirely upon the report of the referee. In that case the court said: "In the former case two findings of fact were made and reported by the referee, upon which the decree in that case undoubtedly depended."

The dictum of the said Minnesota Co. case is not sustained by the authorities therein cited.

However, the doctrine of estoppel by "Former Verdict" is not based upon exceptional cases; but upon such leading cases as Outram v. Moorewood, 3 East, 346; Richardson v. City of Boston, 19 Howard, 267; Duchess of Kingston's case; Packet Co. v. Sickles, 24 Howard, 333, and Cromwell v. Sac, 94 U. S., 351, which, fairly construed, extend only to questions of fact.

In the first of said last-named cases, Outram v. Moorewood, the court held:

> "If a verdict be found on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded, by way of estoppel, in another action between the same parties or their privies, in respect to the same fact or title."

Evidently the "title," held in said case to be conclusively determined by the former verdict, is a title tried and found by a jury.

The same is clear from the language of this court in the said case of Richardson v. City of Boston, 19 Howard, 268, namely:

> "If on the last trial new evidence has been discovered, or if the question of title submitted on the first trial was connected with instructions in law which have since been found to be erroneous; or if a different verdict would have resulted from the different instructions given on the last, it is plain that the first verdict could have but little or no persuasive effect.
>
> "Title is often a question of mixed law and fact, and a party is not concluded by an erroneous opinion of the court pronounced in a former case."

This comports with the opinion of this court in the case of South Ottawa v. Perkins, 94 U. S., 267, before referred to, in which this court said: "That which purports to be the law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circum-

stances of parties. * * The doctrine of estoppel is totally inadmissible in the case."

It also comports with the language of this court in Keokuk & Western Railroad v. Missouri, 152 U. S., 316: "It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision."

In the case of New Orleans v. Citizens Bank, 167 U. S., the former adjudication relied on turned upon the construction of a private charter, not a general statute of the State.

And it appears that the City of New Orleans, in that case, did not rely upon the principle that estoppel by "Former Verdict" does not apply to an erroneous adjudication as to a matter of law. Hence that subject was not considered by this court in that case. Nor was it necessary that the same should be considered by this court in that case.

Section 905, of the Revised Statutes of the United States, required that this court should give to the judgments relied on as estoppel in that case the same effect which the Supreme Court of Louisiana had awarded them in the case of Citizens Bank v. Board of Assessors, 48 La. Ann., 35, which was the basis of the opinion of this court in said case of New Orleans v. Citizens Bank.

It was not the intention of this court in the last-named case to overrule, nor change, the doctrine of estoppel by "Former Verdict" announced by the standard writers on Estoppel, after a thorough review and careful examination of all the principal adjudications on that subject. If there be error in the effect awarded the Louisiana judgments, the responsibility is upon the Supreme Court of that State.

We submit that the erroneous adjudication relied upon by the banks herein, being entirely as to a matter of law and the proper construction of a general statute of the State, the same is not conclusive in these cases.

IV.

The Question of Contract in Said Former Cases was not the Same as the Question of Contract Presented in These Cases, nor did the Question Arise Under the Same Circumstances in the Former as in These Cases.

The question of contract in said former cases was: Whether or not Article two (2) of the Hewitt Bill was repealable, in view of that article itself independently of any judicial construction thereof?

The question of contract presented in these cases is: Whether or not that article was repealable, in view of the article itself and the recent adjudications of the Kentucky Court of Appeals construing the same?

When the construction of a State statute is proposed in a Federal court the first inquiry always is, has the same been construed by the highest court of the State in which the statute was enacted? And whatever construction the highest court of any State may place upon a statute of that State the same is always followed by the Federal court, except where the construction infringes the Constitution or some law or treaty of the United States.

Likewise, the State courts will generally follow former judicial constructions of statutes. Will always do so, except where the former construction is clearly erroneous.

The principle of "stare decisis" prevails in all courts. Upon that principle even decisions that are clearly erroneous are sometimes followed and applied. Hence the law, in its application at least, is every day changed more or less by judicial decisions, and a change in the judicial construction of a law is, as to all practical purposes, a change of the law. The effect is the same where the change is made by judicial determination as where it is made through legislative enactment.

In Douglas v. County of Pike, 101 U. S., 686, this court said: "As a rule, we treat the construction which the highest court of a State has given a statute of the State as part of the statute, and govern ourselves accordingly. * * * Undoubtedly this court will always feel itself bound to respect the decisions of the State courts and, from the time they are made, regard them as conclusive in all cases upon the construction of their own laws. * * * The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retrospective. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

Hence the last opinion of the Kentucky Court of Appeals, in March, 1897, delivered by Judge Paynter, construing Article two (2) of the Hewitt Bill, must be read into said article, as if said opinion had been a legislative enactment.

The question of whether or not that article, with said opinion read into it and being a part thereof, is repealable is a very different question from that involved in said former cases.

Had the Kentucky Legislature of 1897 amended said article according to the import of said opinion, would the question of the proper construction of the article thus amended be the same question as that determined in said former cases? Clearly not. Yet the effect of said opinion upon the question was the same as such legislative enactment would have had. The banks may raise a question as to what the effect of such enactment would have been. Still the question of contract, after such enactment, is different from the question of contract before such enactment.

Suppose that, prior to the adjudication now relied on by the banks, the said opinion of the Kentucky Court of Appeals, delivered by Judge Paynter, had been rendered. What would have been the effect of the same upon the trial and determination of the said former cases? Probably the determination of those cases would have been directly the reverse of what it was. Suppose also that there had never been any construction of said article by the courts of Kentucky. Would not the question now in this court, as to construction of the same, be a different question from what it now is in view of said last adjudication by the State court?

Had the Legislature of Ohio, in 1886, enacted a revenue law identical with the said Hewitt Bill, and the courts of Ohio had construed same to be irrevocable, and the courts of Kentucky had construed same to be repealable, if two cases, one from Ohio and the other from Kentucky, involving a construction of that statute, were brought to this court for review, this court would hold the Ohio act to be irrevocable and the Kentucky act to be repealable, because of the different constructions of the same by the courts of said States.

So that the question of the proper construction of a State statute varies and changes, according to the different adjudications of the same by the courts, especially the State courts.

A question of law embraces all laws that must be considered in its determination, and every change of such laws, whether by legislative enactment or judicial construction, changes the question.

Nor did the question arise under the same circumstances in the former as in these cases.

When said former cases arose, there had never been any judicial construction of said Article two (2) of the Hewitt Bill.

When these cases arose, there had been two different adjudications of the same by Kentucky Court of Appeals, the last adjudication overruling the former and showing by argument and authority that the former was erroneous.

There could not be a greater change in the circumstances attending the trial of any case or question than the said reversal in the law of the State relative to the subject of the controversy in the case.

The law of the case, as to the rights in controversy between the parties, was thereby changed and completely reversed. A new ground of defense against the injunction, and a new ground for demanding the taxes in controversy, were thereby conferred upon the defendants to the former suits.

In Cromwell v. Sac, 94 U. S., 356, this court said: "Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time.

A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

The foregoing principle, more than once announced by this court, applies to legal grounds of recovery or defense no less than to matters of fact, not considered in the former suit.

If a material fact, not considered in the former suit, may be adjudicated in the second suit, certainly a law, not considered and which could not have been considered in the former suit, may be considered and its effect determined in the second action.

In Nesbit v. Riverside Independent District, 144 U. S., 620, this court said:

> "Surely an adjudication as to the effect of one fact alone does not preclude in the second suit an inquiry and determination as to the effect of that fact in conjunction with others. * * * Many reasons may induce or prevent the introduction into the first case of all the facts. It is

> well said in Cromwell v. Sac, page 356, that: 'Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand,' " etc.

The opinion here quotes in full, and applies, the language of Cromwell v. Sac, which we have herein before quoted. Then the opinion observes another aspect of the case, and concludes as follows:

> "So we have in this case a new question not presented in the Des Moines suit, the existence of facts never called to the attention of the court in that case, which in themselves create a perfect defense."

In the case of Howlett v. Tarte, referred to with approval by this court in Cromwell v. Sac, Mr. Justice Willes said:

> "It is quite right that a defendant should be estopped from setting up in the same action a defense which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defense in a second action because he did not avail himself of the opportunity of setting it up in the first action. I think we should do wrong to favor the introduction of this new device into the law."

Is not the law of a case in behalf of a defendant a defense in his behalf? And is he estopped from relying upon the law in his behalf in a second suit against him, upon a new cause of action which arose after the said change of the law, because he failed to rely upon the same in a former suit tried before the law was enacted or established by judicial construction?

At the time of said former adjudication the author of the opinion therein evidently thought it practicable to maintain a system of equal and uniform taxation among the banks of the State under the Hewitt Bill. Subsequent events have shown

that to be a mistake. New banks have been organized. The charters of old banks have expired. Numerous banks have voluntarily accepted the provisions of the new Constitution of the State. So that now the estoppel claimed herein would give a few banks of the State an enormous advantage over the other banks and a monopoly of the banking business of the State.

These conditions did not exist when the former erroneous decision was rendered, and the same would not have been rendered under the present conditions.

Besides, the revenue laws of Kentucky, in respect to the taxation of banks, as expounded by the latest adjudication of the Kentucky Court of Appeals, and as declared in the State Constitution, have now been generally recognized by the banks as the established and organic law of the State. Had this condition existed in 1895 the said former decision would not have been rendered. To now give the said former judgments, based on the opinion written by Judge Pryor, the effect as estoppel asked by the banks, would be to give said opinion directly the opposite effect from that which the author thereof and the Kentucky Court of Appeals intended that the same should have. That opinion aimed at uniformity. The estoppel under present conditions would produce the opposite effect.

In support of the proposition that to constitute an estoppel by "Former Verdict" the question in the second case must be identically the same question, and must arise under identically the same circumstances as in the first case, we need not cite any other authority than New Orleans v. Citizens Bank, 167 U. S.

V.

Judgments Opened and Waived by the Banks.

"If by the pleadings of a party entitled to the benefit of a judgment, he, in seeking by a proceeding ab extra to enforce it, opens the judgment, it is open for general purposes in the second proceeding; and the party opening it can not insist upon the rule of res judicata, if the record of the judgment disclose error such as shows that there was no cause of action whatever."

Bigelow on Estoppel, 5th Edition, page 103, and authorities there cited.

In the case of Brownsville v. Loague, 129 U. S., pages 502 to 505, this court said:

"Under the legislation between the issuing of the bonds in 1870 and this application in March, 1886, authority to levy taxes to pay debts of the character represented by these judgments, when uncompromised, did not exist at the latter date; so that plaintiff was remitted, in the assertion of a right to that remedy, to the time when the bonds were issued, and as the city had then no power to tax to pay them other than that derived from the act of February 8th, 1870, the relator by his pleadings opened the facts which attended the judgments for the purpose of counting upon that act as furnishing the remedy which he sought.

"In this he in effect asked the court to order the levy of a tax to pay the cupons, and relied upon the judgments principally as creating an estoppel upon a denial of the power to do so.

"Thus invited to look through the judgments to the alleged contracts on which they are founded, and finding them invalid for want of power, must we nevertheless concede to the judgments themselves such effect, by way of estoppel, as to entitle the plaintiff ex debito justiciæ to a writ commanding the levy of taxes under a statute which was not in existence when these bonds were issued? * * * In the case at bar it appeared from the judgment records, if not from relator's petition, that the bonds

were issued under an abrogated statute, and were consequently void, and that the respondents possessed no power to tax to pay them, because that power was given only by the statute which had ceased to exist. * * * Res judicata may render straight that which is crooked, and white that which is black, but when application is made to collect judgments by process not contained in themselves, and requiring, to be sustained, reference to the alleged cause of action upon which they are founded, the aid of the court should not be granted when upon the face of the record it appears, not that mere error intervened in the rendition of such judgments, but that they rest upon no cause of action whatever.

"The judgment is reversed and the cause remanded, with directions to dismiss the petition."

There appears to be no material difference between the said case of Brownsville v. Loague and these cases in so far as the question of estoppel is concerned. In that case the judgments were conclusive of Loague's right to the amount recovered, and could not have been rendered without a finding that the bonds and coupons were valid. The bonds and coupons and the judgments thereon being supposed to be valid, the power of the city to satisfy same was implied.

But the complainant, deeming it necessary or proper, went behind the judgments and disclosed the fact that they were based upon an abrogated statute.

The complainant himself having shown the invalidity of the judgments upon which he relied as an estoppel, this court declined to aid in giving effect to the judgments.

So in the cases now under consideration, the banks, deeming it necessary or proper, have themselves gone behind the judgments upon which they rely, and shown that the claim to exemption from local taxes and said judgments are based entirely upon Article two (2) of the Hewitt Bill, which had been abrogated before said judgments were rendered—same having been repealed by the present Constitution of Kentucky in 1891.

The banks, in their bills of complaint herein, set forth their charters and the history thereof, also Article two (2) of the Hewitt Bill and their acceptance thereof, and declare that the same constitute an irrevocable contract between the banks and the State. The said bills also set forth such portions of the State Constitution and statutes as are claimed to be an impairment of said alleged irrevocable contract. Said bills set forth fully and particularly the entire grounds of the judgments relied on, and invite inquiry as to the original question of contract and invoke judgment of the Federal court as to same.

The banks, in their bills, thus opened the law and facts which attended said judgments and set forth the said charters and Hewitt Bill and laws of Kentucky for the purpose of counting upon the same as furnishing a Federal question of contract, and inducing the Federal court to take cognizance of their complaint.

Why do the banks invite inquiry into the original question of contract if no such inquiry may be made? And why do they invoke judgment of the Federal court as to same, if no such judgment may be rendered? If this court may not examine the grounds of the judgments relied on, why were those grounds fully and particularly set forth in the bills?

Did the banks allege and set forth in their bills matters which they did not intend should be considered by the court?

To answer that said grounds (including a complete transcript of the record and proceedings in each case) were set forth in explanation of the judgments, would be only an evasion of the question. Said judgments are set forth in the bills, but not as an estoppel nor as conclusive of the original question of contract; and were evidently only intended by the banks as a support to the claim of irrevocable contract.

Otherwise, one part of each bill is inconsistent with the remainder thereof—the court being invited and invoked to adjudge as to the original question of contract, and at the same time denied the liberty of doing so.

The claim of estoppel is diametrically inconsistent with the very nature and character of the bills of complaint themselves.

> "It has recently been held that where a person partly opens in his pleadings the facts of a judgment on which he relies, he can not object to the other party's treating the whole case as opened."
> Bigelow on Estoppel, 5th Edition, page 103.
> Weed v. Burt, 78 N. Y., 191.

By setting forth the grounds of said judgments the banks have shown that the judgments relied on rest upon no cause of action whatever.

Assuming, as said bills of complaint fully show, that there was no irrevocable contract between the banks and the State, it follows that there was no ground nor cause of action in behalf of the banks. Their suits for injunction and their resistance to the local taxes in controversy were without any foundation whatever.

The banks themselves, then, in their bills of complaint, having invited inquiry as to the original question of contract, and set forth the grounds of the judgments relied on, and shown that the same do not rest upon any cause of action whatever, said judgments are open for the purposes of this litigation and the bills of complaint should be dismissed.

The proposition that a party may apply to a court of equity for equitable aid, showing at the same time in his bill of complaint that he is not in truth entitled to the aid sought, and yet obtain assistance from the chancellor upon a presumption of evidence which his own bill shows to be contrary to the truth, and on that erroneous presumption have a decree in his favor contrary to the merits of the case, is not supported by any authority and is repugnant to reason and good conscience.

A litigant may waive any right he possesses. Especially, he may waive an unjust advantage accidentally obtained, and in every suit in equity upon a judgment or in which a judgment

is relied on, if the complainant sets forth the entire grounds of the judgment and relies upon the same, he thereby waives any conclusive effect of the judgment, as to the pending litigation, and, if there be any principle of estoppel that applies to every case, it is that a party litigant is estopped to deny what he himself has shown to be the truth.

VI.

Aid of Chancellor in Giving Effect to Judgments.

> "When a complainant in equity seeks the means of carrying into effect a decree or judgment rendered in another litigation, but not providing such means of execution, it devolves upon the complainant to show that the decree or judgment is right. * * * So Lord Redsdale and the House of Lords held in the year 1820; and so the Lord Keeper has declared in the year 1700; and so it has been laid down by other and later authorities."
>
> Bigelow on Estoppel, 5th Edition, page 102, and authorities cited.

In Wadhams v. Gay, 73 Ill., 428, the Supreme Court of Illinois, after reviewing the merits of the case and coming to the claim of estoppel, said:

> "Arriving, as we do now, to the conclusion that, upon the evidence in this case, as matter of fact, this consent decree does not rest upon any basis of real right and equity, we come to the inquiry whether a court of equity should lend its aid in carrying it into execution, or give relief which would be tantamount to that. * * * There is no ground in moral right, equity and good conscience to call upon a court of equity to interpose and assist in carrying it into execution. The only ground is, that it stands a decree, a technical right; and the true nature of the application is to enforce a technical estoppel. * * The decree rests on mistake. The jurisdiction of chancery is

> exercisable in relief against mistakes, not to carry them into execution. The decree is a misconstruction of the will, in declaring a life estate, when the will gave a fee, and although error of law is not to be alleged against a judgment or decree by consent, so as to reverse it, it does not necessarily follow that where an application is made by a bill in chancery for the aid of equity, in carrying the same into execution, and really to supply an omission therein, the character of the judgment or decree, as whether rightful or not, must be entirely shut out of view in determining whether the court will be moved to act, or remain passive. * * We are brought to conclude that, upon all the facts and circumstances, there is shown to be no equitable claim for interposition of a court of equity."

The foregoing opinion of the Supreme Court of Illinois was considered and approved by this court, in Gay v. Parpart, 106 U. S., 699—this court declaring as follows:

> "We can not better express ourselves than in the following language from the opinion of the court in the case before referred to (Wadhams v. Gay, 73 Ill.): 'Upon an appeal to equity by original bill to lend its assistance for carrying a decree into execution, because of an omission in the decree providing any means of its execution, it would seem reasonable that the same rule of the court's action should obtain as in case of any solemn agreement under seal; and where there are manifest the elements of injustice, mistake, surprise, misapprehension and want of consideration, to remain passive.'"

The foregoing opinions of the Supreme Court of Illinois and of this court are fully sustained by Bigelow, Herman, Adams and all the other authorities, so far as we have examined.

Bigelow on Estoppel, 5th Edition, page 706, says:

> "The estoppel by record is legal, and hence, to give a court of equity jurisdiction to entertain it, it would be necessary to show some equity apart from the estoppel."

Herman on Estoppel and Res Judicata, Vol. 1, page 10, declares:

> "An estoppel can never be allowed, where it would itself perpetrate fraud, work injustice, or fail to protect the innocent."

"Adam's Equity," page 788, speaking of this kind of actions, says:

> "It is competent for the court, in respect of the special application, to examine the decree, and if it be unjust, to refuse enforcement."

Lord Sugden, on complaint of the same character as those herein, said:

> "I do not understand the rule to be that this court is bound to carry into execution an erroneous decree. On the contrary, I apprehend that when a party comes into this court asking for the benefit of a former decree, he must be prepared to show, if the case requires it, that such decree is right."
>
> O'Connel v. McNamara, 3 Dr. & Warren, 411.

This was fully concurred in by Lord Hardwick, who expressed the same view as follows:

> "When you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it if it appears that you are in the wrong."
>
> 1 Eq. Cas. Abr. 83, pl. 3.

We understand the equity practice of this court to be substantially the same as that of the English court of chancery.

> "The jurisdiction in equity of the Federal courts is subject to the limitations of the Constitution, substantially the same as that of the English court of chancery."
>
> Foster's Federal Practice, 2d. Ed., Vol. 1, § 5.

And that, we may infer (with respect to these cases) from the language of this court in the case of Gelpcke v. City of Dubuque, 1 Wallace, 206, in which the court, speaking through Mr. Justice Swayne, said:

> "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."

If this court would not, in that case, "immolate truth, justice, and the law," in deference to the latest decision by the highest court of the State of Iowa in regard to the proper construction of the Constitution and statutes of that State, a fortiori, will this court not, in these cases, immolate truth and justice in deference to a rule of evidence which, in this instance, would contradict the truth and the law of each case under consideration.

See also, Semonin & Dixon v. Duerson, 13 Ky. Law Rep., 169, decided May 6th, 1891.

The foregoing authorities show:

1st. That, to be available herein, said judgments must appear to be just.

2d. That it is competent for this court to inquire as to the character and foundation of said judgments.

3d. That if it appears from the record, and especially if it appears from the banks' own bills of complaint, that said judgments are erroneous and unjust, the chancellor will not interpose, but remain passive.

Assuming that there was not, in truth, any irrevocable contract between the banks and the State, it follows necessarily that said judgments were erroneous and unjust, and that the banks' claim to exemption from local taxes is unfounded and without any consideration to support it.

To take the property of the citizen taxpayer against his consent, and without any consideration therefor, is repugnant to

good conscience. Yet that is what the banks propose herein, and that is what the injunctions prayed for herein would (if granted) in effect and in fact do.

The banks propose that this court exempt them from taxation without any consideration therefor, and thus impose the taxes which the banks should pay upon other taxpayers, thus taking the property of other taxpayers against their consent and without any consideration therefor.

Lexington v. McQuillans' Heirs, 9 Dana (Ky.), 517.

Another form of the banks' proposition herein is: That they be awarded the benefits of local government, local protection, and local improvements without charge or expense to them, and at the cost of other taxpayers.

The authorities in support of the doctrine, that the chancellor will not interpose to aid in giving effect to an erroneous and unjust adjudication, are unanimous. The English and American, State and Federal, decisions all concur on that subject.

Of course, this court will keep in mind the fact that, by remaining passive in these cases, the court does not impeach nor impair the said judgments. After dismissal of the bills herein, the said judgments will continue in all respects the same that they were before the institution of these suits. And the State courts will give to them their due and proper effect.

But this court will not exercise its equitable jurisdiction where no ground for the exercise thereof has been shown. Especially, will this court not interpose by the extraordinary writ of injunction, "which will never be granted except in cases of urgent necessity" (according to High on Injunction), for the purpose of enjoining a State from enforcing its own Constitution and revenue laws, upon any such grounds as those set forth in the bills of complaint herein.

This court will not undertake to administer equity by doing that which would be inequitable.

A party may, by some means, have obtained judgment upon

a promissory note that had been satisfied before the judgment was obtained, and the same may be enforcible, but this court would not aid in its enforcement.

Yet, such a judgment does not differ, in its equitable character, from the judgments which this court is now asked to enforce, if Article two (2) of the Hewitt Bill was, in truth, repealable.

That same was repealable, being shown by each Bill of Complaint herein. The chancellor, we submit, should not interpose, but should leave the complainants where they were before the institution of these suits.

As to the Cases Generally.

1st. Comparison of these with other Cases—

The several radical differences between these cases and that of New Orleans v. Citizens Bank, 167 U. S., are manifest.

1. In that case, appeals were not pending from the former judgments relied on. In these cases, such appeals are pending.

2. In that case, the parties and privies to the former cases were the same as in the subsequent case.

In these cases, the parties and privies are different from those of the former cases relied on herein.

3. In that case, the question determined in the former cases was not as to the proper construction of a general statute of the State. Besides, the objection that the former adjudication was as to a matter of law was not made nor considered; and the effect of the former judgments had been fixed and determined by the Supreme Court of Louisiana, which determination this court followed pursuant to § 905 of Rev. Stats. U. S.

In these cases, on the contrary, the question determined in the former cases was as to the proper construction of a general statute of the State; and it is earnestly and confidently urged that a former erroneous construction of a general statute of the State is not conclusive of that construction in a subsequent

case as to a different cause of action from that in which the erroneous construction was adjudged; and the effect of the particular former judgments relied on herein has not yet been determined by the courts of Kentucky in favor of the alleged estoppel, on the contrary, in Commonwealth v. Douglas, 15 Ky. Law Rep., 581 (decided December 16th, 1893), the Kentucky Court of Appeals held: That where a former judgment in one case has been overruled in another case, the last opinion destroys the effect of the former judgment as res judicata in subsequent cases.

4. In that case (New Orleans v. Citizens Bank), the question of contract determined in the former cases relied on was the same, and arose under the same circumstances as in the subsequent case.

In these cases, the question of contract presented is not the same, nor does it arise under the same circumstances, as in the former cases relied on herein.

5. In New Orleans v. Citizens Bank, the bank did not go behind the judgments relied on and show the same to be erroneous and unfounded and based upon no cause of action whatever, thereby waiving and defeating the presumption on which they relied, as the banks have done in these cases.

6. In that case, it did not appear, either from the bills of complaint or the record, that there was no consideration for the alleged exemption from taxation and no equity in the cause of complaint. Nor did it appear that the bank was not, in truth, protected by irrevocable contract.

In these cases, it appears from the record, and from the banks' own bills of complaint, that there is no consideration for the alleged exemption and no equity in the causes of complaint, and that the banks are not, in truth, protected by irrevocable contract of exemption.

In addition to the foregoing cardinal differences between the said Citizens Bank case and these cases, there are other differences that should be observed. When these suits were insti-

tuted there were pending in the Franklin Circuit Court at Frankfort, Ky., suit for mandamus, styled Board of Councilmen v. L. C. Norman, Auditor, &c., to which the Bank of Kentucky, Farmers Bank and Deposit Bank of Frankfort were parties, involving every question and matter involved in these cases, and in which the rights of said banks involved herein could have been, and would have been, fully protected, if not by the State courts, by writ of error from this court. Hence there was no necessity nor occasion for the appeal to equity herein. That suit is now pending in the said State court, but proceedings therein are embarrassed and restrained by the proceedings in these suits, in violation of § 720, Rev. Stats. U. S.

See printed record of Bank of Kentucky case, pages 111 to 138.

Besides, New Orleans v. Citizens Bank, 167 U. S., was notably a case sui generis. The Citizens Bank of New Orleans, while nominally a private corporation, was a quasi public corporation. Its capital had been advanced and furnished by the State. The State held a mortgage upon all its assets. No stockholder, except the State, had ever drawn any dividend. The State was represented in and controlled the directory thereof. The bank was indebted to the State to the extent of several millions of dollars. The extinguishment, or not, of that indebtedness depended upon the successful operation of the bank.

All taxes, therefore, paid by the bank were deducted from the State's dividends, and really paid by the State.

To have subjected the bank to the taxation involved in that case might have resulted in embarrassment and bankruptcy to the bank, and immense loss to the State. The foregoing were considerations for the exemption of that bank from all taxation, and were very material in the determination of said case.

The banks in these cases, on the contrary, are ordinary private corporations, instituted and conducted solely for private

gain, and not entitled to any privilege or immunity in the matter of taxation.

We will not tax the attention of the court by further comparison of these with other cases.

We regard the case of Phœnix Ins. Co. v. Tennessee, 161 U. S., as conclusive of these cases. So the case of Keokuk & Western R. R. Co. v. Missouri, 152 U. S., seems no less conclusive of the merits of these cases. This court will, itself, compare the last mentioned two cases (161 U. S. and 152 U. S.) with these cases.

2d. Inconsistent Positions Occupied by Banks—

The inconsistent positions occupied by the banks herein are obvious. They invite inquiry into the original question of contract and invoke judgment as to same. Yet they contend that there can not now be any inquiry as to that question nor adjudication of the same. They show in their bills that there was no irrevocable contract, yet undertake to show the contrary by a presumption which they have shown to be erroneous.

They claim, that said former judgments apply to all the taxes in controversy herein, and to all the parties hereto, and to the question of contract herein, and protect them against all taxation except as provided in the Hewitt Bill. Yet they ask this court to render a second judgment for the same purpose and to the same effect. According to the banks' construction of the said former judgments, the same are a complete bar to these suits by the banks.

In view of § 905, Rev. Stats. U. S., the banks must concede that this court should not give to the said former judgments of the State court any greater or other effect than is awarded them by the State court.

Yet the only ground for asking the interposition of the Federal court is that the State court will not award said judgments their due and proper effect.

Their (banks') only argument is, that the interest of the Re-

public requires an end of litigation, while they persist in the prosecution of unnecessary suits, for that which they claim they already have, and which is now sub judice in cases pending in the State courts.

3d. Jurisdiction—

We have deferred consideration of the subject of jurisdiction until after presentation of other aspects of the cases, because we thought the best method of showing the absence of jurisdiction, to be by showing in advance the real character of the cases. Having done so, we think it apparent, without any specific discussion of that subject, that no sufficient ground for the exercise of this court's jurisdiction has been shown.

We submit that, according to In Re Ayer, 123 U. S., 443, and authorities therein cited, these are suits against the State of Kentucky in violation of the 11th amendment to the Constitution of the United States. The State can not, without its consent, be enjoined from carrying into effect its own Constitution and revenue law, when the same do not infringe the Constitution nor any law or treaty of the United States. The State Constitution and revenue laws, in controversy, can not be carried into effect without the assessment and certification and collection of taxes pursuant thereto.

We submit also that, according to Phœnix Insurance Co. v. Tennessee, 161 U. S., there is no question of contract and no Federal question in these cases (after the original question of contract has been eliminated). Were these cases here on writ of error to the State court, the bills would be dismissed on authority of the said Phœnix Insurance Co. case.

These cases are here on appeal from the U. S. Circuit Court, but the fact remains, as in the last-named case, that there is no question of contract and no Federal question in the case, after it has been determined that the Hewitt Bill was repealable. 'Tis true that the U. S. Circuit Court will, where a Federal question remains in the case, dispose of the entire case.

But we do not understand that, on original bill in that court, after it has been ascertained that there is no ground for invoking the Federal jurisdiction the court will retain and exercise jurisdiction solely for the purpose of disposing of a non-Federal question. This court is familiar with the authorities pertinent to that subject.

After one decision to the contrary by a majority of the Kentucky Court of Appeals, it may seem presumptious to contend that there was never any substantial ground for a claim to irrevocable contract by virtue of the Hewitt Bill; but, in that contention, we are supported by the said opinions of Judges Taft and Paynter.

Supplement to the Revised Statutes of the U. S., Vol. 1 (1874-1881), page 175, section 5 of chapter 137, provides:

> "That if, in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after said suit has been brought or removed thereto, that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, * * the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require."

Besides, it is not every case involving a question of contract, of which the U. S. Circuit Court will exercise jurisdiction. To give the jurisdiction on the ground of contract, it must be "a case arising under the Constitution or laws of the United States," and this court has repeatedly declared that, to make such a case, it must involve "a construction of the Constitution or laws of the United States."

These cases do not involve any such construction. They involve only the construction of a State statute, and application of the principle of estoppel as a rule of evidence.

As to what constitutes a case arising under the Constitution

and laws of the United States, see Foster's Federal Practice, 2d Ed., Vol. 1, § 17, and authorities there cited.

It will be observed from the foregoing act of congress, that the jurisdiction of the U. S. Circuit Courts, in cases of this character, is more limited than the jurisdiction of this court on writs of error to the State courts.

See Foster's Federal Practice, 2d Ed., § 477.

Independently of the Federal jurisdiction, there is no equitable jurisdiction of these cases. It appearing that the banks are not, in truth, protected by irrevocable contract, there is no equity in their bills. Their bills do not present a cause of action that is cognizable in equity.

In support of the foregoing proposition, as to equitable jurisdiction, we need not cite any other authority than "Foster's Federal Practice," 2d Ed., Vol. 1, § 12.

The position of the banks herein is precisely the same as if they were asking the chancellor to aid in giving effect to a judgment upon a promissory note shown by their bills to have been paid and satisfied before rendition of the judgment thereon.

It is so obviously fair, just and right, that taxation should be equally apportioned among the beneficiaries thereof, that this court has uniformly held and now holds: That, where any person claims immunity from equal taxation, he must establish the exemption beyond doubt.

That principle applies with increased force to cases in which the claim of exemption is based solely upon a technical estoppel against the truth.

We most respectfully submit: That the court below did not err in holding that Article two (2) of the said Hewitt Bill was repealable and was repealed by the State Constitution of 1891 and Revenue Act of 1892; but that, in so far as the claim to

estoppel was sustained, the judgment of said court was erroneous, and that the bills of complaint herein should be dismissed.

W. S. TAYLOR, Attorney General,
For Kentucky.

T. H. CROCKETT, City Attorney,
For the City of Frankfort.

JAS. [illegible]. POLSGROVE, County Attorney,
For the County of Franklin.

IRA & W. H. JULIAN,
For said City and County.

Authorities.

1st. Appeals Pending—Prevent Estoppel—

Freeman on Judgments, 4th Ed., Vol. 1, § 328, and authorities there cited.

Yocum v. Moore, 4 Bibb, 221.

Talbot v. Morton, 5 Littell, 326.

Cox v. Griffith, 12 Ky. Law Rep., 482.

Civil Code of Practice, Ky. (last Ed.), § 747.

Civil Code of Practice, Ky. (last Ed.), § 734.

Phœnix Ins Co. v. Tennessee, 161 U. S., pages 183 to 186.

Revised Statutes U. S., § 905.

2d. Parties and Privies—

Bigelow on Estoppel, 5th Ed., page 142, and authorities there cited.

In Re Ayer, 123 U. S., 443, and authorities therein cited.

Mechem on Agency (1889 Ed.), page 1.

American and English Enc. of Law, Vol. 21, pages 184 to 234.

Opinion of lower court herein as to Northern Bank of Kentucky.

3d. Adjudication as to Matter of Law—Conclusive only as to the case determined—

Bigelow on Estoppel, 5th Ed., pages 100 to 101, and authorities there cited.

South Ottawa v. Perkins, 94 U. S., 267.

Richardson v. City of Boston, 19 Howard (U. S.), 268.

Goodale v. Tuttle, 29 N. Y. Reports (2 Tiffany), 467.

Bernard v. City of Hoboken, 3 Dutcher's (27 N. Y. L.) Reports, 412.

Packet Co. v. Sickles, 5 Wallace, 585.

Sawyer v. Woodbury, 7 Gray (Mass.), 502.

Last Chance Min. Co. v. Tyler Min. Co., 157 U. S., 691.

Bigelow on Estoppel, 5th Ed., page 80.

Aspden v. Nixon, 4 Howard (U. S.), 467.

Packet Co. v. Sickles, 24 Howard (U. S.), 340.

Outram v. Moorewood, 3 East, 346.

Cromwell v. Sac, 94 U. S., 351.

Keokuk & Western R. R. Co. v. Missouri, 152 U. S., 316.

Revised Statutes, U. S., § 905.

48 La. Ann., 35.

4th. Identity of Questions and Circumstances, necessary—

Douglas v. County of Pike, 101 U. S., 686.

Bank Tax Cases (Ky.), decided March 24th, 1897 (39 S. W. Rep., 1030).

Cromwell v. Sac., 94 U. S., 356.

Nesbit v. Riverside Ind. Dist., 144 U. S., 620.

Howlett v. Tarte, referred to in Cromwell v. Sac.

New Orleans v. Citizens Bank, 167 U. S.

5th. Judgments relied on opened and waived by Banks—

Bigelow on Estoppel, 5th Ed., page 103, and authorities there cited.

Brownsville v. Loague, 129 U. S., 502 to 505.

Weed v. Burt, 78 N. Y., 191.

6th. Aid of Chancellor in giving effect to judgments—

Bigelow on Estoppel, 5th Ed., 102, and authorities there cited.

Wadhams v. Gay, 73 Ill., 428.

Gay v. Porpart, 106 U. S., 699.

Bigelow on Estoppel, 5th Ed., 706.

Herman on Estoppel and Res Judicata, Vol. 1, page 10.

Adams' Equity, page 788.

O'Connel v. MacNamara, 3 Dr. & Warren, 411.

1 Eq. Cas. Abr., 83, Pl. 3.

Foster's Federal Practice, 2 Ed., Vol. 1, § 5.

Gelpcke v. City of Dubuque, 1 Wallace, 206.

Semonin & Dixon v. Duerson, 13 Ky. Law Rep., 169.

As to cases generally—

In Re Ayer, 123 U. S., 443, and authorities therein cited.

Phœnix Ins. Co. v. Tennessee, 161 U. S., 183 to 186.

Keokuk & Western R. R. Co. v. Missouri, 152 U. S., 301 to 317.

11th Amendment to Constitution, U. S.

Rev. Stats U. S., § 720.

Rev. Stats U. S., § 905.

Sup. Rev. Stats U. S., Vol. 1, page 175.

Foster's Fed. Practice, 2d Ed., Vol. 1, § 17, and authorities there cited.

Foster's Fed. Practice, 2d Ed., Vol. 1, § 12.

Bank Tax Cases (Ky.), decided March 24th, 1897, known as Owensboro cases, made appendix to this brief.

APPENDIX.

DEPOSIT BANK OF OWENSBORO, - - - *Appellant,*
versus
DAVIESS COUNTY, &c., - - - - - - - *Appellees.*
FARMERS AND TRADERS BANK, - - - *Appellant,*
versus
CITY OF OWENSBORO, &c., - - - - - - *Appellees.*
OWENSBORO SAVINGS BANK, - - - - - *Appellant,*
versus
CITY OF OWENSBORO, &c., - - - - - - *Appellees.*
CITIZENS SAVINGS BANK, - - - - - - *Appellant,*
versus
CITY OF OWENSBORO, - - - - - - - *Appellee.*
DEPOSIT BANK OF OWENSBORO, - - - *Appellant,*
versus
CITY OF OWENSBORO, &c., - - - - - - *Appellees.*
CITY OF CARLISLE, - - - - - - - - *Appellant,*
versus
DEPOSIT BANK OF CARLISLE, - - - - *Appellee.*
NICHOLAS COUNTY, - - - - - - - *Appellant,*
versus
DEPOSIT BANK OF CARLISLE, - - - - *Appellee.*
CITY OF CARLISLE, - - - - - - - *Appellant,*
versus
FARMERS BANK OF CARLISLE, - - - *Appellee.*
SIMPSON COUNTY BANK, - - - - - - *Appellant,*
versus
CITY OF FRANKLIN, - - - - - - - *Appellee.*

Opinion of the court delivered by Judge Paynter.

These cases were pending either in this or the lower courts when the cases known as the bank tax cases were decided. (97 Kentucky.)

From that opinion the writer of this one dissented, in which Judges Lewis and Guffy concurred.

The questions of law involved in these cases are similar to those in cases mentioned; we, therefore, re-examine and reconsider the question as to whether the opinion of the majority shall stand as the law regulating the taxation of the banks of the State.

The conclusion which we have reached is that the shares of stock, etc., in the banks are subject to county and municipal taxation, hence the opinion referred to should be and is overruled. So is the case of Franklin County Court, &c. v. Deposit Bank of Frankfort, &c., 87 Ky., overruled for the reasons which shall hereinafter appear.

This conclusion of the court renders it necessary to discuss the questions of law in the other "bank tax cases," and we will consequently use parts of the dissenting opinion without quotation marks. There were four banks in the State commonly designated as the "old banks," and they were the Bank of Kentucky, chartered in 1834; the Northern Bank, in 1835; the Bank of Louisville, in 18—; the Farmers Bank of Kentucky, in 1850. The charters of the first three banks named were extended by the same act of the General Assembly in 1858, and each of the charters were extended by subsequent legislative acts. In neither of the acts of extension is reference made to the act of 1856, nor does either contain express limitation upon the taxing power of the State.

The charter and amendments of the Farmers Bank of Kentucky were extended by an act of the General Assembly in 1876, but the right to repeal the charter and its amendments by "either by general or special act" was reserved in the act. The charters of all other banks operating under charters were granted after the act of 1856. This was the situation when the revenue bill of 1886, generally called the "Hewitt Bill," became a law. The provisions of it relating to the taxation of banks is article 2, chapter 92, General Statutes, and reads as follows:

The Hewitt Law.

"Sec. 1. That shares of stock in State and national banks and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to 10 per cent. of their capital stock, which shall be in full of all tax, State, county and municipal."

"Sec. 4. That each of said banks, institutions and corporations, by its corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank, and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

"Sec. 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly, provided they pay the tax provided in section 1 from the passage of this act."

"Sec. 7. If any bank, State or national, shall fail or refuse to pay the tax imposed by this act, or shall fail or refuse to

make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation, and its surplus, undivided accumulations and undivided profits shall be assessed as directed by section 2 of this act, and the taxes, State, county and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: Provided, That nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

"Sec. 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68) of the General Statutes."

Section 8 of chapter 68, referred to in section 6 above, is as follows: "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

These statutes were in force when the Constitutional Convention met to frame the present Constitution. This instrument was adopted on the 28th day of September, 1891.

Section 174 is as follows: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, license or franchise."

Power to Tax Not Surrendered.

Section 175, present Constitution of Kentucky, provides: "The power to tax property shall not be surrendered or suspended by any contract or grant to which the Commonwealth shall be a party."

In pursuance to these provisions of the Constitution the General Assembly enacted laws under which the taxes were levied on the shares of the capital stock, etc., for county and municipal purposes about the imposition of which these controversies arose.

The General Assembly, by the laws imposing the taxes for county and municipal purposes, reduced the amount which the banks had been paying the State so as to only collect forty-two and one-half cents on each one hundred dollars of the value of the property interest in the bank assessed. This is the rate of taxation paid by individual property. The rate under the "Hewitt Bill" was seventy-five cents on each share of the capital stock equal to one hundred dollars, or on each one hundred dollars of stock therein, and in addition thereto pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeded an amount equal to 10 per cent. of their capital stock, which was in full of all tax, State, county and municipal. We assume the banks filed their written consent as provided for in section 4 of artice 2. It is claimed that the banks have irrevocable contracts with the State from which it can not recede without their consent: that the Constitutional Convention and the State had no power to change the mode or fix a higher rate of taxation than was imposed in the act of 1886.

It is gravely asserted that when those who gave the State its organic law and statutory law seek to impose the burden of taxation equally on those who should bear it, that a contract is attempted to be violated and the State is acting in bad faith.

Obligation of Contract.

We fully realize the wisdom of that provision of the Federal Constitution which declares that no State shall pass any law "impairing the obligation of contracts." The State should deal honestly with its citizens, thus setting an example worthy of the imitation of those who constitute the State.

It has been said "a compact lies at the foundation of all national life; contracts make the progress of communities in civilization and prosperity. They guard as far as possible against the fluctuations in human affairs. They seek to give stability to the present and certainty to the future. They gauge the confidence of man in the truthfulness and integrity of his fellowmen. They are the springs of business, trade and commerce. Without them society could not go on. Spotless faith in their fulfillment honors alike communities and individuals."

While this is true, we feel that the fervid eloquence of an orator could not in too earnest terms plead the justness of this demand of the citizens that each integral part of the State shall bear its fair proportion of the burdens of the State. The one which seeks to show that it is just to grant the privilege of exemption from taxation except in consideration of a public service has assumed a vast undertaking.

The State which refuses to surrender one of its attributes of sovereignty, the power to impose taxes on corporations or individuals, demonstrates its regardful care of the rights of its citizens and manifests its purpose to preserve its existence.

When the State has in express terms declined to surrender any part of its sovereignty and seeks to exercise its prerogative, we are unable to see the slightest foundation for the imputation of bad faith.

From the Dartmouth College case to the present time the Supreme Court of the United States has uniformly held that whenever the Legislature granting the charter reserved the

right to amend or repeal it, either by so providing in the charter or by a general law, the right to amend or repeal such charter exists, and to do so is not to impair the obligation of a contract, the charter being accepted with the full understanding that the right of repeal is part of the contract, and to the exercise of which right the grantee has consented.

Many of the States, after the Dartmouth College case, began to realize the importance of reserving the right to control corporate organizations which from time to time were being created, and to make sure such power was being reserved they passed general laws expressly reserving such powers, which statutes became a part of every act of incorporation as fully as if written therein, unless a different purpose was therein plainly expressed.

The Legislature of this State, being fully aware of the importance of such action as would reserve the right to amend or repeal acts of incorporation, passed what is known as the statute of 1856, which is section 8, chapter 68, General Statutes.

Charters Subject to Change.

It seems so plain that charters and grants since the 14th of February, 1856, are subject to amendment or repeal at the will of the Legislature, unless a contrary intent is plainly expressed therein, that it is needless to discuss it.

The Supreme Court of the United States has not only so held, but this court has done likewise in every case that has been before it.

Acts of the character of the act of 1856 have uniformly been adjudged to be a condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made, and to be as much a part of the charters as if incorporated into them. Any other interpretation would render the statute inoperative, and wholly

deprive it of its power to accomplish the purpose of its enactment.

In 1841 South Carolina passed a statute substantially the same as the statute of 1856. The Southeastern Railroad Co. was incorporated in 1851. In 1855 an act was passed to amend its charter, the amendment exempting the railroad company from taxation. In 1868 the State adopted a new Constitution, in which it was declared that the property of the corporations then existing or thereafter created should be taxed. The Legislature of the State passed an act to enforce that provision of the Constitution.

The question involved in Tomlinson v. Jessup, 15 Wallace 454, was as to the enforcement of such legislation. Justice Field, in delivering the opinion of the court in the case, said: "It is true that the charter of the company, when accepted by the corporators, constituted a contract between them and the State and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character; and it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him; but these considerations can not be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed or as subsequently modified, or its entire revocation. The original corporators or subsequent stockholders took their interest with knowledge of the existence of this power and of the probability of its exercise at any time in the discretion of the Legislature. The object of the reservation, and of similar reservation in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contracts

with corporators which, without that provision, would be irrepealable and protected from any measures affecting its obligation."

State's Power to Tax.

"There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power, such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the Legislature may deem it expedient for the public interests that the revocation shall be made.

"The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State."

The same doctrine is enunciated in Railroad v. Maine, 96 U. S., 499; Railroad Co. v. Georgia, 98 U. S., 359; Hoge v. Railroad Co., 99 U. S., 348; Greenwood v. Freight Co., 105 U. S., 13, 21; Spring Valley Waterworks Co. v. Scholter, 110 U. S., 347-352; Close v. Greenwood Cemetery Co., 107 U. S., 466-476; Louisville Gas Co. v. Citizens Gas Co., 115 U. S., 683-696; Gibbs v. Consolidated Gas Co., 130 U. S., 369-408; Sioux City Street Ry. Co. v. Sioux City, 138 U. S., 98-108.

It was said in Hamilton Gas Light Co. v. Hamilton, 146 U. S., 271:

"This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract, but where one of the conditions of the grant is that the Legislature may alter or revoke it, a

law altering or revoking, or which has the effect to alter or revoke, the exclusive charter of such privileges can not be regarded as one impairing the obligation of the contract, whatever may be the motive of the Legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation.

"In Greenwood v. Union Freight Co., 105 U. S., the question was as to the scope and effect of a clause in a general statute of Massachusetts, providing that every act of incorporation passed, after a named day, 'shall be subject to amendment, alteration or repeal, at the pleasure of the Legislature.' This court, referring to that clause, said: 'Such an act may be amended—that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it that may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the Legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the Legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reason which prompted it.

"The words 'at the pleasure of the Legislature' are not in the clauses of the Constitution of Ohio or in the statute to which we have referred; but the general reservation of the power to alter, revoke or repeal a grant of special privileges necessarily implies that the power may be exerted at the pleasure of the Legislature."

Supreme Court Decision.

It must be conceded from the authorities cited the Supreme Court of the United States has repeatedly held that the Legislatures of the States have the power, when reserved in the charter or by general law, to change or repeal acts granting corporate privileges or franchises. The decisions of this court are in accord with these opinions.

The case of Griffin v. Kentucky Insurance Co., 3 Bush, 592, has been quoted with approval in the case of Louisville Water Co. v. Clark, 143 U. S., 14, and in that case the court held that in all cases of charters or grants of corporate franchises, where the intention of the Legislature was not "plainly expressed," not to exercise the power reserved by the statute of 1856 to amend or repeal at the will of the Legislature, such charters or grants must be read as if all the provisions of the act of 1856 were incorporated in them.

Judge Robertson, in delivering the opinion in Griffin v. Kentucky Insurance Co., 3 Bush, 595, said: "Then was the general reservation of power, like a special reservation in the charter itself, a part of the contract; or was the contract made subject to it and the obligation defined or modified by it? We think so. And whatever might be thought of the policy of such legislation, or of the policy or justice of the repealing statute, over which the judiciary has no jurisdiction, our conclusion as to the mere power of repeal is, as we think, sustained by reason and abundant authority.

"All contracts, except such as are municipal, are made subject to law, and their obligation is defined by the lex loci contractus.

"Why should the contract in this case be excepted? Such exception would be unreasonable, and the authorities fortify the reason."

In the case of Cumberland & Ohio Railway Co. v. Barren County Court, 10 Bush, 604, in reference to the act of 1856,

the court said: "The act was intended to preserve to the State control over all acts of incorporation thereafter passed. Experience has demonstrated the propriety of, if not the absolute necessity for, such a reservation of power, and it would be a manifest disregard of the clearly expressed will of the Legislature for the courts to resort to technical rules of construction or finely-drawn legal implications to escape the effect of the plain declaration that all charters of and grants to corporations shall be subject to amendment and repeal 'unless a contrary intent be plainly expressed.'"

We conclude that the Legislature in 1886, when it passed the Revenue Bill, had the right to amend or repeal at will all charters and grants of or to corporations, or amendments thereof enacted or granted since the 4th of February, 1856, "unless a contrary intent was plainly expressed."

National Banks Also Subject.

The national banks were subject to have the same tax imposed on their shares of stock as are imposed on State banks doing business under charters granted since the 14th of February, 1856. Their real estate is subject to taxation. Their shares of stock may be taxed at their actual value, but no greater rate of taxation shall be collected on them than is assessed upon the moneyed capital in the hands of individual citizens of the State.

In the case of the Covington City National Bank v. City of Covington, &c., 21 Federal Reporter, 491, Justice Matthews, discussing this subject, said: "When, therefore, as statute taxes the shares of a stockholder at their actual or market or full value, that necessarily includes such value beyond its par or nominal value as is imparted to the stock by the fact that the bank has a surplus fund or undivided profits."

The interest which Congress has left subject to taxation by

the States under the limitation prescribed, and which is a distinct, independent interest in property held by the shareholder, like any other property that may belong to him, is that interest, as defined in Van Allen v. The Assessor, 3 Wall., 573, which "entitles him to participate in the net profits earned by the bank in the employment of its capital during the existence of its charter in proportion to the number of its shares, and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts, and (page 587) it includes for taxation the whole interest of the shareholder, such as would pass to the purchaser of the share on a transfer of his certificate. So when a State law taxes shares of national bank stock it taxes the same interest of the shareholder that he would transfer on a sale. The State may tax them at their actual or at their market value, or at any other rate of appraisement which does not violate the act of Congress."

To the same effect are the cases of People v. Commissioners of Texas, 94 U. S., 415; Mercantile Bank v. New York, 121 U. S., 138.

In the latter case the court said (page 155): "The main purpose, therefore, of Congress in fixing limits to State taxation on investments in the shares of national banks was to render it impossible for the State, in levying such tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

The Legislature of Pennsylvania passed a statute taxing the shares in national banks on an assessed value thereof for county, school, municipal and local purposes. The Supreme Court, in Hepburn v. The School Directors, 23 Wallace, 480, held the statute valid.

It has been decided that it is competent for the States to tax the shares of national bank stock, notwithstanding the capital

of the bank was invested in bonds of the United States which were not subject to taxation. (National Banks v. Commonwealth of Kentucky, 9 Wallace.)

The national banking law does not prevent the State from taxing stock in national banks at a higher rate than that imposed on the most favored banks operating under the laws of the State.

This question was fully determined in Lionberger v. Rouse, 9 Wallace, 468, when the court said:

Concessions by Congress.

"It is very clear that Congress, in conceding to the States the right to tax, adopted a measure which, it was supposed, would operate to restrain them from legislating adversely to the interests of the national banks. The measure itself had reference to prospective legislation by the States, and its object was accomplished when the States conformed, as far as practicable, their revenue systems to it. Exact conformity was required, if attainable, but the law-making power did not intend such an absurd thing as that the power of the State to tax should depend on its doing an act which it had obligated itself not to do. It was well known at the time, and Congress must be supposed to have legislated on this subject with reference to it, that States, by contract with individuals or corporations, could grant away the right of taxation, and that this power had been frequently exercised. It was equally within the knowledge of Congress that the policy on this subject varied in different States, while some of them retained in their own hands the power of taxation over all species of property, except such as were devoted to religious or charitable purposes; others had parted with it to interests of a purely business character, like banks and railroads. Can it be supposed that Congress, with this condition of things in the country, meant to confer a privilege by one section of a law which, by another, it made

practically unavailable? If the construction contended for by the plaintiff in error be allowed, then a State so unfortunate as to have a single bank, whose shareholders are exempt by contract from taxation in the manner provided by Congress, can derive no benefit from the power given to tax the shares of national banks. And this further consequence would follow, that the shareholders of national banks located in one State would escape all taxation, while those whose property was invested in banks in a different locality would have to contribute their full share of the public burdens. This court will not impute to Congress a purpose that would lead to manifest injustice, in the absence of an express declaration to that effect. Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the proviso to the forty-first section of the national banking act than to require of each State, as a condition to the exercise of the power to tax the shares in national banks, that it should, so far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

What Was the Intention of the Legislature.

The court should endeavor to ascertain the legislative intent in the act of 1886 with reference to the taxation of banks, as all depends in this controversy upon what was that intent. To aid in reaching a conclusion as to what the intent was, it is well to recall some official facts within the knowledge of the members of the Legislature.

The 1st of July, 1885, was the date of the last report of the capital stocks of the bands in the State before the enactment of the revenue law of 1886. From that it is learned that the capital stock of the fifty-nine national banks amounted to $9,708,900. The capital stock of sixty-five State banks, doing business under charters granted subsequent to 1856, amounted to $6,224,891. The capital stock of the four State banks—Farmers Bank of

Kentucky, Bank of Kentucky, Northern Bank and the Bank of Louisville—incorporated prior to 1856, was $5,144,500.

It will be seen from this statement that the capital stock of the national banks and of the State banks chartered since 1856 amounted in round numbers to $16,000,000, while the capital stock of banks whose charters antedate 1856 amounted to about $5,000,000, being less than one-third of that of the other banks named.

It must be presumed that the Legislature knew that the banks claiming irrevocable contracts to pay only fifty cents on each share of their capital stock equal to $100 paid less than one-third of the revenue coming from the banks under the then existing law.

Contract Not Irrevocable.

It can hardly be said that the Farmers Bank of Kentucky was in a condition to claim an irrevocable contract because the act extending its charter, which became a law on March 10, 1876, expressly reserved the right to amend or repeal its charter and amendments thereto. It reads as follows: "That the charter of the Farmers Bank of Kentucky, as amended, be extended for a period of twenty-five years from the termination of its charter as therein fixed: Provided, That said charter and amendments shall be subject to amendment or repeal by the General Assembly, either by general or special act: And provided further, That whilst the privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

To simply quote the act extending the charter is a sufficient denial of and answer to the claim of an irrevocable contract. This left but three banks in the State which could claim an irrevocable contract, and 125 without any claim whatever to immunity against increased taxation.

The revenue act repealed several acts by particularly naming them, and excluded certain other acts from the repealing clause, and declared all other acts, general and special, and parts of acts inconsistent or not in conformity therewith, were thereby repealed. Chapter 92, General Statutes, contained the revenue law. The only part of the act relating to the taxation of banks and other institutions of loan or discount is article 2, chapter 92, General Statutes. Section 1 of the article relates to the amount of tax which the banks shall pay, and designating the method of levying the tax. Section 2 imposes certain duties on the cashier of the bank with reference to making a report to the Auditor of Public Accounts. Section 3 exempts banks having certain money invested in bonds or funds of the United States from taxation named in the section.

By the terms of section 7 if the banks failed or refused to make the consent or agreement as provided in section 4, then they are to be assessed and the same tax, State, county and municipal, shall be imposed, levied and collected, etc., as is imposed on the assessed taxable property in the hands of individuals.

Without section 4 the remaining sections of the article would have been a complete system for levying and collecting taxes on the banks chartered after 1856. The article treats of nothing except the taxation of banks. Under section 4 the banks were asked to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation.

The national banks were subject to the payment of taxes for State, county and municipal purposes, and it was not necessary to obtain their consent that they might be taxed for that purpose. It was needless to ask this class of banks to enter into the agreement.

The Legislature may have entertained some doubt, not as to the right to tax banks for State, county and municipal purposes, but as to the method prescribed and desired to remove

all doubt by obtaining the consent of such banks to that method. It was greatly to the interest of the national banks and the State banks chartered subsequent to 1856 to enter into the agreement because they were thus released from the payment of county and municipal taxes.

Beneficial Concessions.

In agreeing to pay the amount provided in the article for State purposes they were released from local burdens, which in some instances are two or three times as great as that which they agreed to pay the State. It was greatly to their interest to accept the proposition of the State.

As a matter of fact these banks were relinquishing no rights. They were apparently yielding a right which the State, in its sovereingty, already possessed. The right had never been relinquished, but had been expressly reserved. So vigilant had been the State to retain control of corporations and retain its power to tax them, its purpose to do so was declared in the form of a legislative enactment which was understood to be written in every act of incorporation.

It may be a more difficult task to show why the three old banks entered into the agreement. Their right to the immunity from increased taxation was questioned, as shown by the revenue act, as their charters were declared repealed so far as they were inconsistent therewith.

It was the evident purpose of the Legislature to induce these banks to recede from their claim to an irrevocable contract. It was desired that all banks should be placed upon the same footing in the matter of taxation with the other banks of the State. The Legislature had been renewing their charters, and if they were again renewed an appeal must be made to the same power. These banks may have realized that the act of 1856 should have, by a proper interpretation, been made applicable

to the acts renewing their charters. However, it is needless to speculate further as to the reason which induced them to enter into the contract with the State by which they released any irrevocable contract which they had under their charter against increased taxation. These banks had the right to give their consent to the increased taxation.

The courts had always recognized the right of a corporation to consent to legislation or accept its provisions and be bound thereby, though it may have the effect of depriving such corporation of a vested right. This brings us to the question as to what were the terms and conditions of the contract into which all these banks entered. The banks must be presumed to know the law, and the effect of the contract to which they agreed. Those who represent banks are among the brightest and most sagacious business men of the country. The law is brief, simple and without ambiguity. In short, the State agreed to accept and the banks agreed to pay seventy-five cents annually on each share of their stock equal to $100, and, in consideration thereof, be exempt from all other taxation whatsoever so long as this tax shall be paid during the corporate existence of such bank. If these were all its terms, then it might be contended with some reason that it was irrepealable during their corporate existence.

Being mindful of the policy which had been pursued for thirty years, it said in effect to the banks it is desired that the statute shall be accepted in the formal way prescribed, but it must be understood that the right to alter or change it is reserved to the State. That its purpose might be fully understood, the Legislature placed in the article section 6, which in terms makes the statute of 1856 a part of the contract.

It is expressly provided that the article shall be subject to the provisions of section 8, chapter 68, General Statutes. The Legislature was determined that the provisions of the act of 1856 should not depend on rules of construction to be read into the contract by implication, but in terms said that it should

be part thereof. It is admitted that when the word "act" appears in article 2 it has reference to the article (2). Article 2 was an independent measure, offered as a substitute to article 2 of the original bill.

Old and New Alike.

The substitute was adopted and became a part of the revenue bill. It now appears as part of the bill in the exact language as offered. This section 6 has no reference to any part of the revenue bill except the article of which it is a part. It has been suggested that it had reference to new banks that might be organized. This could not be so because article 2 is dealing with banks in existence, and asks them to give their consent, etc., thereto, and says, if at all, they must do so before the meeting of the next General Assembly.

When it was admitted that the word "act," as used, is synonymous with "article," then it must be admitted that the provisions of section 6 of article 2 are applicable alone to the article (2) of which it is a part. If there could be any doubt from the language used as to the meaning of the Legislature, then that must be removed by an examination of the House and Senate Journals.

An amendment (page 1241, House Journal, 1886), was offered to article 2 of the original revenue bill, and section 7 of that amendment reads as follows: "This act shall not be subject to the provisions of section 8, chapter 68, of the General Statutes." The amendment (page 1243, House Journal, 1886) was defeated.

While the revenue bill was pending in the Senate it was proposed to amend section 6 of article 2 by inserting after the word "shall" in the first line the words "not for ten years" (page 1315, Senate Journal, 1886). This amendment was defeated. Had it been adopted then the section would have

read: "This act shall not for ten years be subject to the provisions of section 8, chapter 68 of the General Statutes."

The proceedings of the House and Senate show the Legislature fully understood the purpose for which this section was made part of article 2. It was the purpose of the Legislature not to be restricted for any period of time in its right to repeal the article and withdraw from the contract.

In view of the plain provision of the statute, about the meaning of which there should be no doubt, and the intent of the Legislature being fully explained by its record, it seems to us there should be no hesitation in concluding the act of 1856 should be read as part of the statute, hence an irrevocable contract did not exist. The fact that a written consent was asked and secured does not alter the application of the act of 1856. The act of 1856 should be read as part of the act of 1886 even if it had not been referred to as part of it.

Waterworks Case.

In Louisville Water Co. v. Clark, 143 U. S., 10, this rule of construction was recognized. The court said: "But in respect to all the acts passed after 1856 amending the charter of or relating to the Water Co., including that of 1882, each must be read as if all the provisions of the act of 1856 were incorporated in it, because in no one of them is plainly expressed an intent to waive the right of amendment or repeal at the will of the Legislature." Greenwood v. Freight Co., 105 U. S., 20, is to the same effect. New Jersey v. Yard, 95 U. S., 104, is cited by counsel for appellees and also by counsel for appellants.

The facts of that case were as follows: The Morris & Essex Railroad Co. was created a corporation by an act of the Legislature of New Jersey, passed January 29, 1835. The act provided that as soon as the net proceeds of the railroad amounted

to 7 per cent. on its cost it should pay a State tax of one-half of 1 per cent. on the cost of the road, and no other tax should be levied upon it. The twentieth section reserved to the Legislature the right to amend or repeal the act whenever it should think proper. A supplemental act was passed March 2, 1836, in which the right to repeal or amend was reserved.

On the 14th of February, 1846, the Legislature of New Jersey passed an act in effect the same as the Kentucky act of 1856. Another supplemental act to the charter of the railroad was approved March 23, 1865, authorizing a branch road to be built, and by which the company was vested with all the powers and franchises given by the original and supplemental act, etc. The third section of the last-named act reads as follows: "Be it enacted that the tax of one-half of 1 per cent. provided by this said original act of incorporation, to be paid by the said company to the State whenever the net earnings of the said company amount to 7 per cent. upon the cost of the road, shall be paid at the expiration of one year from the time when the road of the said company shall be open and in use to Phillipsburg, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatever, by or under the authority of this State or any law thereof: Provided, That this section shall not go into effect or be binding upon the said company until the said company, by an instrument duly executed under its corporate seal and filed in the office of the Secretary of State, shall have signified its assent thereto, and which assent shall be signified within sixty days after the passage of the act, or this act is void."

The instrument required by the section was duly executed by the company. In the act of 1865 there was no reservation of the right to repeal or amend. Acts of the Legislature imposed more burdensome tax on the railroad company than it provided for it in section 3, supra. The sole question in New Jersey v. Yard was whether the act of 1865, and its acceptance

by the railroad company, constituted a contract which could not be impaired by any subsequent Legislature of the State.

The New Jersey Decision.

The court held that it was an irrevocable contract because the Legislature had not reserved the right to amend or change it. It is plain from the opinion that had the Legislature reserved the right to alter or change the contract, or act by which it was made, the court would have held the act of the Legislature doing so did not impair the obligation of the contract Justice Miller, in delivering the opinion, said: "But, as we have already said, since the Legislature which passed the act of 1865 had the power to make a contract which should not be subject to repeal or modification by one of the parties to it without the consent of the other, the main question here is, did they intend to make such a contract? * * * In the case now under consideration it is conceded on all hands that the act of 1865 was a contract for a tax of one-half of 1 per cent. per annum on the cost of the Morris & Essex Railroad and no more. But counsel for defendant says the contract was repealable; that the Legislature, of its own volition, could impose other and more burdensome taxes at its discretion; that it was a contract so long as the Legislature of New Jersey was satisfied with it, and no longer. It is conceded also that the construction of it can not be sustained unless we are bound to import into it either the reservation clause of the act of 1836, or what is called the interpretation act of 1846.

"We have already shown how little reason there is for doing this on general principles of construction. We think it still clearer that it can not be done because it is inconsistent with the legislative intent in passing the act of 1865. * * * The implication is of a right to revoke it, and comes from the other quarter, and is one which we do not think exists by fair con-

struction, and which we do not feel at liberty to import into the contract to defeat its manifest purpose."

From the language of this opinion, and the long line of decisions of the same court, it is manifest that the decision was made to turn on the question of the reservation of the right to amend or repeal, etc.

In New Jersey v. Yard the court held the act was invalid because the right to repeal or modify had not been reserved.

In this case we are asked to hold the organic and statutory laws invalid because the right to repeal or modify was reserved in express terms.

By the very terms of the act of 1856 a rule of interpretation is given that "all charters and grants of or to corporations or amendments thereof and all other statutes" shall be subject to amendment or repeal at the will of the Legislature unless a contrary intent be therein "plainly expressed."

It is proposed now by those representing the banks to disregard this statutory rule of construction. It is now in effect insisted that, in order to reserve the right claimed, it must be "plainly expressed" in the act that it is reserved; this being done, it is still disregarded. The Legislature, doubtless anticipating such contention and versatility, "plainly expressed" in the article that whatever was done thereunder or in pursuance thereof could only continue during its will. If section 6 was not for this purpose we would like to have had some one suggest some reason as to why it was placed in the article. The doctrine is that when it is asserted that a State has bargained away her right of taxation in a given case the contract must be clear, and can not be made out by dubious implication. (New Jersey v. Yard, supra).

Chief Justice Taney, delivering the opinion of the court in Ohio Life Insurance and Trust Co. v. Debolt, 16 Howard 425, gave a rule of construction as follows: "The rule of construction in cases of this kind has been well settled by this court. The grant of privileges and exemptions to a corporation are

strictly construed against the corporation and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation nor any other power of sovereignty, which the community have an interest in preserving undiminished, will be held by the court to be surrendered unless the intention to surrender is manifested by words too plain to be mistaken. This is the rule laid down in the case of Billinge v. The Providence Bank, and reaffirmed in the case of the Charles River Bridge Co."

Court of Appeals of Kentucky Sustains this View.

The Supreme Court has enunciated substantially the same rule in numerous cases.

The taxing power of the State is never presumed to be relinquished unless the intention to relinquish is expressed in clear and unambiguous terms. (Bradley v. McAtee, 7 Bush, 667.)

It is a familiar rule of construction of statutes that effect must be given to every provision, except in cases of absolute and irreconcilable incongruity. (Dazey v. Killem, 1 Duvall, 407.)

If one statute refers to another for the power given by the former, the statute referred to is to be considered incorporate in the one making the reference. (Nunes v. Wellisch, 12 Bush, 365.)

Mr. Cooley, in his work on Taxation, page 204, says: "As taxation is the rule and exemption the exception, the intention to make an exception ought to be expressed in clear and unambiguous terms; and it can not be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain."

For the interpretation of statutes, this court, in Nicholas v. Wells, Sneed, 259, said that "the most natural and genuine way of construing a statute is to construe one part by another

part of the same statute; that the words and meaning of one part of a statute do frequently lead to the sense of another; and, if it can be prevented, no clause or sentence or word shall be superfluous, void or insignificant."

As there is a clear expression of the legislative intent in the statute, no rules are really necessary to aid in its interpretation.

It can hardly be said it was unwise on the part of one hundred and twenty-five of the one hundred and twenty-eight banks in the State, as by the very terms of the act under which the contract was entered into they were required to pay State, county and municipal taxes, with the power in the Legislature to increase it at will.

It certainly was a very advantageous contract for them to enter into, when these banks paid more than two-thirds of the taxes paid by all the banks, with the power in the Legislature to increase the amount if they should so desire. What reason can be suggested as to why the Legislature would desire to reverse the policy which had been steadily adhered to for so long and enter into an irrevocable contract with such banks? Why should it want to surrender a power which it had been so zealous to preserve?

The contract was made subject to the right of the Legislature to withdraw from it whenever it regarded the public interest demanded it should do so.

Rights to Immunity Surrendered.

Whenever the banks accepted the provisions of the act of 1886 they surrendered any rights to immunity from increased taxation which their charters gave them.

The acceptance of the act of 1886 was a consent to the repeal of so much of their charters as were inconsistent therewith. Hence they stood in such relation to the State as to future taxation as the Legislature saw proper to impose. If the pro-

visions of their charters relating to taxation were repealed, as it must be admitted they were by the act of 1886, then such provisions were no longer in force. It is unreasonable to say that the provisions of the charters fixing the rate of taxation on the banks at fifty cents on each share of the capital stock of the banks equal to $100 can be in force if the act of 1886 fixing such tax at seventy-five cents instead of fifty on shares is in force. In doing this it must be admitted the charter privilege has been repealed. If repealed, then, by the act of 1886, surely the only way in which the provisions of their charters could be restored would be by the Legislature so providing in some act. There is no pretense this has been done. The fact that the law of 1886 has been repealed does not restore the former provisions of their charters.

Section 644, Kentucky Statutes, provides: "When a law which may have repealed another shall be repealed the previous law shall not be revived unless the law repealing it be passed during the same session of the General Assembly."

It is a most groundless contention to say that if the present law is sustained the old banks will be restored to the former privileges under their charters.

It has been suggested that the provisions of their charters with reference to taxation were vested rights, and, although they consented to the legislation of 1886 and became subject to the provisions of the act of 1856, still, as the charter privilege as to taxation was a vested right, therefore, it was saved to them by the provision which preserves "other rights previously vested."

The proviso of the act of 1856 is "that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

If a corporation by its charter or a general law is exempted from the payment of taxes it is released of a duty or burden. It enjoys an immunity or exemption from a general law which imposes the burden of the government on others. It may be

said it enjoys a privilege. "Franchise is a branch of the king's prerogative subsisting in the hands of a subject." (2 Sharswood, Blackstone, Comm., 37.)

The Legislature has reserved the right to amend or repeal the privileges and franchises, thus reserving the power to destroy or qualify the privileges and franchises which have been granted. The "other rights" which have become vested while operating under the charter can not be impaired by an amendment or repeal. These "other rights" do not embrace "privileges and franchises."

Privileges and Franchises.

The "privileges and franchises" are the rights bestowed by the State, to be withdrawn or destroyed at the pleasure of the Legislature. In the exercise of its pleasure the Legislature may fix a higher rate of taxation, or it may declare to those enjoying the franchise that they shall no longer have it. Privileges and franchises are not "vested rights," either in the letter or spirit of the act of 1856.

"Other rights" referred to in that act are such as the beneficiaries under the charter or general laws may have in property, contracts, choses in action, real and personal property, in fact every interest which they could acquire in operating under the charter or law, and also such rights or interests as other persons may have previously acquired by contract, mortgage, judgment or otherwise in property belonging to the corporation.

The purpose of the act of 1856 was to reserve in the Legislature the power to destroy the privileges and franchises granted in the charters. If it does not have this effect it would be entirely inoperative, and the effect to retain control of the corporations would be abortive. The claim that the privileges granted by article 2 can be repealed, but without the right to

terminate their enjoyment, is not founded in reason. The only privilege which the banks enjoyed was to pay the seventy-five cents on each share of stock in lieu of all other taxes. To say that the law granting the privilege can be repealed because the right to do so was reserved, as is admitted, and still leave the banks in its enjoyment (as is the effect of the opinion of the court in the bank tax cases), is to disobey a plain statute, to ignore the authority of the opinions of the Supreme Court, and is a failure to follow sound reasoning in the settlement of a question of vast importance to the State and the people. The former opinion on this question gave the banks the substance and the State the shadow. Had section 6 of article 2 provided that the act of 1856 should not be considered part of it, we do not doubt the representatives of the banks would have early seen the meaning of the provision. As it is plainly written that the act of 1856 is to be considered a part of the article, they have the very greatest difficulty in seeing the purpose of the provision.

It was said in Griffin v. Kentucky Insurance Co., 3 Bush, 594, "the proviso was intended to secure the right of beneficiaries and others vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchise."

To the same effect is the Cumberland & Ohio Railroad Co. v. Barren County Court, 10 Bush, 600. Section 174 of the Constitution recognized a just principle when it declared that all property, whether owned by persons or corporations, should be taxed in proportion to its value unless exempted thereby, and that all corporate property should pay the same rate of taxation paid by individual property.

The Legislature, in obedience to that provision of the Constitution, enacted the law for levying and collecting tax from the banks of the State, the validity of which is in question in these cases.

Some of the best lawyers in the State were members of the

convention which framed our Constitution, who gave an earnest consideration to the questions involved in these cases, and the conclusions which they reached were crystallized into section 174 of the Constitution. We believe that their conclusions are correct.

The former opinion of the court denies the power is in the Legislature to say what taxes the banks of the State shall pay for State purposes during the existence of their several charters. It denies the right of the Legislature to compel them to bear any of the burdens of county and municipal government.

The Reversal of Policy.

We can not believe the Legislature did or intended by article 2 of the act of 1886 to reverse its policy so earnestly pursued for a generation and surrender to sixty odd banks of the State its rights previously reserved, to control them in the matter of taxation, and to give up its power to increase or diminish the taxes imposed on one hundred and twenty-five banks, this including the national banks.

Exigencies may arise requiring the levying and collecting of vast sums to meet the public demand, yet, however great the emergency may be or imperative the demand for money to meet such wants, the Legislature is powerless to compel the banks to contribute more than they are now paying at any time during their corporate existence.

The counties and municipalities are annually compelled to raise large sums of money by taxation. The counties of the State are compelled to incur large expense to support the county governments, to pay for bridges and public highways, and support their unfortunate citizens. The municipalities must incur great expense in making all necessary improvements for the comfort, safety and health of their citizens, to supply water and lights and to give police protection to their citizens and to the banks.

The organic and statutory law of the State, in our opinion, require that the banks should contribute their proper share of such expense to the local governments. In Franklin County Court, &c. v: Deposit Bank of Frankfort, &c., 87 Ky., the court adjudged that there was a broad distinction between the extension of a charter and the grant of a new one. This is true in a certain sense. To extend a charter requires a statute to be enacted, and which grants certain rights to the corporation.

Under the act of 1856 all statutes and also grants to corporations are subject to amendment or repeal. All acts granting extensions to the charter of corporations since the 14th of February, 1856, are as much subject to amendment or repeal as are acts of incorporation passed since that date. In so far as the case of Franklin County Court, &c. v. Deposit Bank of Frankfort, &c., 87 Ky., 370, is in conflict with this opinion, it is overruled. (Shields v. Ohio, 95 U. S., 323; Railroad Co. v. Maine, 96 U. S., 503; Commonwealth v. Masonic Temple Co., 87 Ky., 349.)

There are many National and State banks organized since the passage of the Hewitt Bill. They certainly can not claim, with any degree of reason, that they have any, much less an irrevocable, contract with the State. If there could have been any doubt on the question it is overruled by Bank of Commerce v. Tennessee, &c., 163 U. S., 416.

If the banks which accepted the Hewitt law are to be exonerated from the payment of county and municipal tax, then, during the existence of their respective charters, the burden placed upon the banks is not equal and just. In the same city or town we will have part of the banks paying county and municipal tax, whilst others have immunity from such burdens. It will greatly increase the value of the stock of the banks enjoying special privileges, whilst it will necessarily render less valuable stock in the banks which have the burden of a share of county and municipal taxes. It will be a check

on the organization of new banks. It will give the favored banks a monopoly of the business in their respective communities. The effect would be an unjust and unwarranted discrimination. It was seriously argued in the former opinion of this court that the enforcement of the Constitution and laws will diminish the revenues of the State government. With this we have nothing to do. It is our business to obey the Constitution, and respect the statutes enacted in accordance therewith. Were this a question of policy involved, it is not considered a great task to vindicate its wisdom. While more of the citizen's tax will go to support the State government, yet he is trebly compensated by the banks contributing the fair share of county and municipal taxation, and thus reducing the amount which each citizen will be required to pay to sustain the local governments.

The cases of the Deposit Bank of Owensboro, Farmers and Traders Bank, Owensboro Savings Bank, Citizens Savings Bank v. City of Owensboro, &c.; Deposit Bank of Owensboro v. Daviess County, Simpson County Bank v. City of Franklin, are affirmed, and the cases of City of Carlisle v. Deposit Bank of Carlisle, Nicholas County v. Deposit Bank of Carlisle and City of Carlisle v. Farmers Bank are reversed, with directions that further proceedings conform to this opinion.

COMMONWEALTH OF KENTUCKY.

At a Court of Appeals, held in and for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 19th day of June, 1897, the following order was entered: Deposit Bank of Owensboro v. City of Owensboro, Daviess; Farmers and Traders Bank v. Same, Daviess; Owensboro Savings Bank v. Same, Daviess; Citizens Savings Bank v. Same, Daviess; Owensboro National Bank v. Same, Daviess.

The court being sufficiently advised, the petition for rehearing in each of the foregoing five cases is overruled.

Afterwards at a Court of Appeals, held as aforesaid, on June 23, 1897, the following order was entered: Deposit Bank of Owensboro v. Daviess County, &c., Daviess.

The court being sufficiently advised, the petition for rehearing in this case is overruled.

Copies—Attest: A. ADDAMS,

Clerk Kentucky Court of Appeals.

NEW ORLEANS v. CITIZENS BANK, 167 U. S., 385.

In the above-styled case, this court said:

"Since this case was decided below, the Supreme Court of the State of Louisiana has had before it a suit brought by the bank against the Board of Assessors, asserting its non-liability to assessment and taxation under its charter, for taxes against real estate acquired by it under foreclosure of its stock mortgages. Certain judgments (presumably those relied upon in this record) were set up as constituting res judicata.

"The court of last resort of the State said in its opinion on the first hearing that it was not necessary to pass upon the plea of the thing adjudged, since the judgments relied upon did not embrace the question of whether property bought by the bank under foreclosure of its stock mortgages was included in the exemption. In that case both the act of 1880, above referred to, and the act of 1874 were set up as conclusively establishing that the bank was not exempt from taxation at all.

"In an opinion on a rehearing the court somewhat modified the grounds of its conclusions, and in the course of the opinion said: 'We refrain from stating the effects as to the taxation of the bank's capital in consequence of act 79 of 1880' (We now do the same, because we think it unnecessary to do so.) 'We propose to let that question as to the exemption of the bank's capital rest on the decisions heretofore rendered.'"

In concluding the opinion the court said:

"'We think the Citizens Bank has heretofore obtained all that it is entitled to, the exemption from taxation of its capital proper and the real estate necessary for carrying on its legitimate business or purposes.'"

State, ex rel. Citizens' Bank v. Board of Assessors, 48 La. Ann., 35.

> "From the foregoing statement it is evident that the contention of the plaintiffs in error, if maintained, will overthrow the construction of a statute of the State of Louisiana, sanctioned by nearly sixty years' of practical execution, and supported by decrees of the courts of that State which are final, which were regularly rendered during a long period of time whenever an attempt was made to assess the property of the bank.
>
> "It is true that during the greater portion of the time when the charter was construed by the officers of the State of Louisiana, and interpreted by the courts as rendering taxation of the bank illegal, the original charter was in force, and the question whether the bank was subject to taxation during the term of its extended charter could not therefore technically arise. But the old charter period expired in 1884, and it is clear that from 1884 until 1892, not only was the bank generally treated as not liable to taxation under its charter, but whenever an attempt was made to tax it the courts of the State held the assessment unlawful.
>
> "Indeed the language of the Supreme Court in the case to which we have referred, decided since the decree under review was rendered, sustains the construction which the charter of the bank had previously received under so many years of practice approved by the repeated adjudications of the Louisiana courts."

In the foregoing state of case, it is difficult to understand how this court could have properly reached any other conclusion in that case than that which the court did reach.

Section 905, Rev. Stats. U. S., applies, not only to the mere admissibility of "records and judicial proceedings" as evidence, but also to their force and effect.

See authorities cited in margin of said section.

~~See also many recent decisions of~~ Mills v. Duryee, 7 Cr., 481, ~~of this court on same subject.~~

In the said New Orleans case, the officers were threatening

to act ultra vires. Hence same was not a suit against the State.

There was a good consideration for the exemption, and there was no want of equity in the bill of complaint.

PHŒNIX INSURANCE CO. v. TENNESSEE, 161 U. S., 174.

In the above-styled case, this court said:

> "Second. Concluding, as we have, that this plaintiff in error, insurance company, is not exempt from taxation, by the language of the statutes above mentioned, we come to the consideration of the second defense interposed by its shareholders.
>
> "It seems that some time in the year 1873 the shareholders, or some of them, were sued by the city of Memphis to collect from them certain taxes alleged to be due that city for the year 1872 upon the shares of stock held by them."

(Here the court recites proceedings in the above-mentioned suit, in the Tennessee court and this court, which resulted in a final judgment in favor of the shareholders, sustaining the exemption and perpetually enjoining collection of the taxes in controversy.)

> "This judgment was entered by consent, and pursuant to the stipulation of the parties entered into at the time the writ of error was sued out in the Hill case, and it is now set up and offered in evidence in favor of the shareholders of the insurance company, who are admitted to be the direct successors of the shareholders of the company sued in the former action, and the decision of the State court, refusing the benefit of that adjudication to the shareholders, is claimed to have been error, and to present a Federal question for review by this court.

* * * "We think the decision of the Supreme Court as to the weight to be given the judgment is not reviewable by us because it is not a Federal question. The former judgment determined that, as between the city and the shareholders, the latter were not subject to pay the taxes for the years specified. In the action now under consideration we have determined that there was no immunity conferred either upon the corporation or the stockholders by the statutes cited. On the trial of this action the former judgment was offered in evidence by the shareholders, and it was held to constitute no bar to the maintenance of this action by the plaintiff, nor did it operate as an estoppel upon their right to claim taxes for subsequent years.

"The judgment offered in evidence was the judgment of a State court, and the refusal to accord to it all that was claimed for it as an estoppel by counsel for plaintiffs in error was, in any event, no more than a refusal to give to a judgment of one of its own courts that degree of force as evidence which it was by general law entitled to.

* * * "If a State court erroneously decides a question of law regarding the weight to be given one of its own judgments and among its own citizens, that error is not subject to review by this court, because it constitutes no Federal question.

"If it were otherwise, every decision of a State court, claimed to be erroneous, which involved the failure to give, what the defeated party might claim to be the proper weight to one of its own judgments, would present a Federal question, and would be reviewable here.

"There is no question of contract in the case. It is wholly one of evidence as to whether or not a prior judgment in a State court operated as an estoppel against the plaintiff below, and prevented the State court from granting it the relief to which it would otherwise be entitled.

* * * "We hold that the question in any event, as presented in this case, was not a Federal question."

KEOKUK & WESTERN RAILROAD v. MISSOURI, 152 U. S., 301.

In the above-styled case, this court said:

> "To the argument that this judgment constitutes an estoppel, there are two answers: First, there was no such privity of estate between the defendant in the suit, namely, Missouri, Iowa and Nebraska Company, and the defendant in this suit as makes the judgment in that case res judicata in this case. * * *
>
> "Second. A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in Cromwell v. County of Sac, 94 U. S., 351.
>
> * * * "It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision. * * *
>
> "In addition to the fact above stated that a suit for taxes for one year is not an estoppel to a suit for taxes for a different year, there is the same absence of that privity of estate so indispensable to an effective estoppel, which we hold to be fatal in respect to the judgment in the State court."

When a decision is based upon two distinct grounds, each of which is expressly declared to be sufficient, the decision of one ground is as much authority as that of the other. However, both grounds of the above decision apply to these cases.